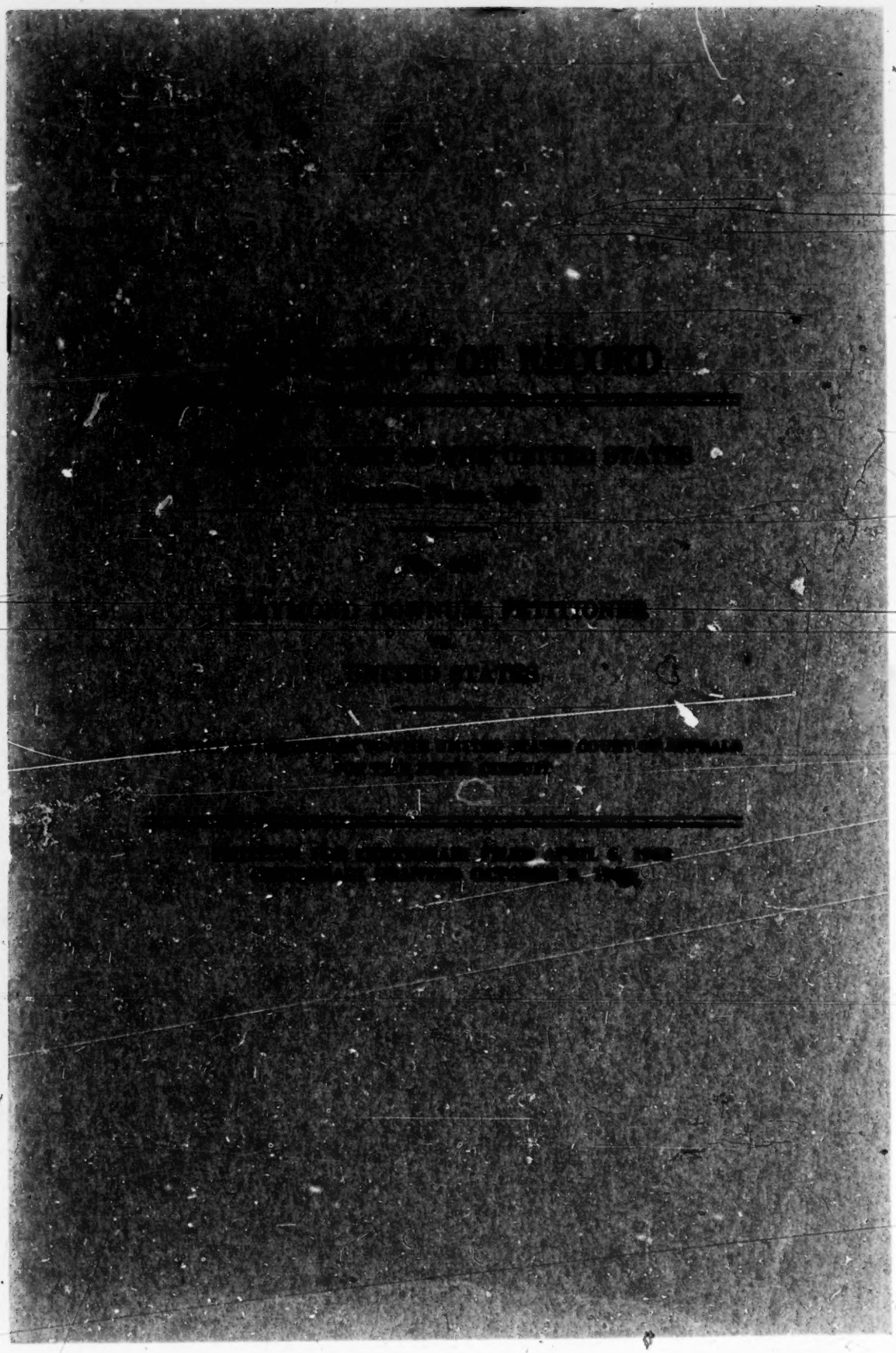

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 489

RAYMOND DOWNUM, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

2 In United States District Court, Western District
Of Texas, San Antonio Division

Criminal No. 22115

Vio. 18 USC 1708, 495 and 371

UNITED STATES OF AMERICA

vs.

JUAN R. CAMPOS, RAYMOND DOWNUM, RONNIE HECK, AND RAYMOND HECK

Indictment

Filed April 17, 1961

THE GRAND JURY CHARGES:

That on or about December 3, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Juan R. Campos, Ronnie Heck, and Raymond Heck; acting jointly and severally, knowingly and unlawfully stole from a house letter box, a letter addressed to Dolores M. Cameron, 648 West Elmira Street, San Antonio 12, Texas, and the said Juan R. Campos, Ronnie Heck, and Raymond Heck removed from such letter an article, to-wit, Check No. 15,676,363, drawn on the Treasurer of the United States in the sum of $56.30, which said check is fully described in the Second Count hereof.

COUNT TWO

That on or about the time and place and within the jurisdiction, all as set out in the First Count hereof, Ronnie Heck, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Dolores M. Cameron, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $56.30, which said check is described as follows:

> Check No. 15,676,363 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Dolores M. Cameron, in the sum of $56.30.

COUNT THREE

That on or about the time and place and within the jurisdiction, all as set out in the First Count hereof, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck, acting jointly and severally, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the Second Count hereof, then knowing the endorsement thereon to be forged.

3 COUNT FOUR

That on or about December 6, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Raymond Downum, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Jayme J. Maltsberger, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $58.00, which said check is described as follows:

Check No. 15,443,535 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Jayme J. Maltsberger, in the sum of $58.00.

COUNT FIVE

That on or about the time and place and within the jurisdiction, all as set out in the Fourth Count hereof, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck, acting jointly and severally, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the Fourth Count hereof, then knowing the endorsement thereon to be forged.

COUNT SIX

That on or about December 1, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Raymond Downum, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Clarence D. Rutledge, upon the back of

a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $19.00, which said check is described as follows:

> Check No. 1,624,541 drawn on the Treasurer of the United States, dated November 30, 1960, issued at Dallas, Texas, over Symbol No. 3110, payable to the order of Clarence D. Rutledge, in the sum of $19.00.

COUNT SEVEN

That on or about the time and place and within the jurisdiction, all as set out in the Sixth Count hereof, Raymond Downum, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the Sixth Count hereof, then knowing the endorsement thereon to be forged.

4 COUNT EIGHT

That on or about November 4, 1960, and continuing to and through December 28, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck, acting jointly and severally, did unlawfully, knowingly and wilfully combine, conspire, confederate and agree to commit offenses against the United States of America, the exact date of the formation of the conspiracy and its termination being to the Grand Jury unknown, to-wit, to knowingly and unlawfully steal from a house letter box a letter and to remove from such letter a check drawn on the Treasurer of the United States; to knowingly and fraudulently make and forge the name of the payee upon the back of a U.S. Treasury Check for the purpose of obtaining and receiving from the United States a certain sum of money; and to knowingly and wilfully utter as true the check described knowing the endorsement thereon to be forged, and pursuant to said conspiracy, and to effect the objects thereof, the following overt acts were committed:

1. On or about November 4, 1960, Raymond Downum, Raymond Heck, Ronnie Heck, and Juan R. Campos met in a tavern on South Presa Street in San Antonio, Texas.

2. On or about December 1, 1960, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck had another meeting.

3. On or about December 1, 1960, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck agreed to split up into two teams, one team being comprised of Raymond Downum and Juan R. Campos, and the other team composed of Raymond Heck and Ronnie Heck.

4. On or about December 1, 1960, Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck walked up and down numerous streets in San Antonio looking in mail boxes for Government Checks.

5. On or about December 3, 1960, Raymond Downum furnished his automobile, a 1951 Plymouth, License Number JR-4013, to Raymond Heck, Ronnie Heck, and Juan R. Campos.

6. On or about December 3, 1960, Juan R. Campos, Ronnie Heck, and Raymond Heck drove in Raymond Downum's automobile to the vicinity of Hoefgen Avenue, San Antonio, Texas.

7. The acts described in Counts One, Two, Three, Four, Five, Six and Seven of this Indictment.

A True Bill,

ROSCOE HARDING,
Foreman

RUSSELL B. HINE,
United States Attorney.

6 United States District Court, Western District of Texas, San Antonio Division

No. 22115

THE UNITED STATES OF AMERICA

vs.

JUAN R. CAMPOS (19), RAYMOND DOWNUM (21), RONNIE HECK (20) AND RAYMOND HECK (24)

Indictment

Vio. 18 USC 1708, 495 and 371.

Filed in open court this 17th day of April, 1961.

MAXEY HART, *Clerk.*

Warrant is hereby ordered for the arrest of the defendant, Raymond Heck. Bail is hereby fixed in the sum of $1,500.00 returnable instanter to the San Antonio Division of the Western District of Texas, to be taken by any United States Commissioner.

BEN H. RICE, Jr.,
United States District Judge.

9 In United States District Court, Western District of Texas, San Antonio Division

Criminal No. 22115

Vio. 18 USC 1708, 495, and 371

[Title omitted]

Plea of former jeopardy

Filed April 27, 1961

Now comes Raymon Downum, defendant in the above case, prior to the selection of the second jury in this case, and files this plea of former jeopardy and asks the court to sustain it and dismiss the charges against him and as grounds would show to the court as follows:

I.

On a Wednesday afternoon, April 19, 1961, defendant Downum was arraigned in open court on the indictment in this case together with defendants, Juan R. Campos and Ronnie Heck. Defendant Downum pled not-guilty as to all counts of the indictment against him, while the defendants, Juan R. Campos and Ronnie Heck pled guilty to all counts of the indictment at that time.

II.

On Tuesday, April 25, 1961, at approximately 10 o'clock, the Court called the case of *United States of America* vs. *Downum*, this cause, for selection of the jury and both sides announced ready, and thereupon the jury was selected, which jury was designated by the Court as Jury No. 4 and instructed to report at 2 o'clock in the afternoon of Tuesday, April 25, 1961. Prior to jury's leaving the box on the morning of April 25, the jury was duly sworn and instructed not to discuss any of the facts of the case of United States of America vs. Raymond Downum.

III.

At 2 o'clock on Tuesday, April 25, 1961, the jury still being in the hall and not in the courtroom, the court announced from the bench that the prosecutor had conferred with him in his office and had advised that the Government was not ready because of the absence of a material witness and the court stated that he was going to discharge the jury until some later time.

IV.

Defendant through his attorney of record objected and inquired of the prosecutor who the missing witness was, and the prosecutor stated it was Clarence D. Rutledge, named payee in the check involved in count 6 and 7 of the indictment against Raymond Downum. Thereupon the defendant moved that the court allow this jury that had been selected to try the other four counts upon which Mr. Rutledge was not involved, to wit, counts 3, 4, 5 and 8. The court overruled this motion; thereupon counsel for the defendant moved to dismiss counts 6 and

7 for want of prosecution. The court overruled this motion. Thereupon the court proceeded to discharge the jury.

V.

At 2 o'clock on Thursday, April 27, 1961, defendant was called to pick another jury and prior to picking this jury, which will be a different jury from a different panel than the panel from which the first jury was selected, defendant says to the court that he has been placed in jeopardy once the first jury was sworn in and that the charges against him should now be dismissed, since to try him at this time would be to place in double jeopardy against the fifth amendment to the Constitution of the United States of America.

VI.

Defendant would show to the court that there has been no motion for continuance filed at this time setting out what diligence or exercise by the prosecutor for the government in obtaining Clarence D. Rutledge or any reason why they could not have ascertained the subpoena had not been served on Clarence D. Rutledge prior to picking the first jury in this case. This defendant says that this was not a "unforeseeable circumstance" which arose during the course of the trial nor an urgent circumstance. Furthermore, there was no showing by the District Attorney that even though Clarence Rutledge had not been served with subpoena by the U.S. Marshall's Office, that he was not on his way to the trial and would pick up his
11 subpoena in the Marshall's office in San Antonio when he arrived, and no showing that he would not be able to arrive before this trial was concluded.

VII.

This defendant says the District Attorney took a chance by allowing the first jury to be impaneled and sworn without having ascertained whether or not his witnesses were present. There was no continuance asked for by the Government to enable them to check and see if their witnesses were all present, and in fact, the U.S. Marshall's Office is directly across

the hall from the U.S. Attorney's Office and just down the corridor from the District Court.

VIII.

This is a situation where the District Attorney simply entered upon a trial of the case without sufficient evidence to convict as to counts 6 and 7, and for some reason of his own, was unwilling to go ahead on the balance of the counts and requested another jury not only as to counts 6 and 7 but as to all counts.

IX.

Defendant specifically calls the attention of the Court to the case of *Cornero* vs. *United States* 48 5th 2d 69 (9th Cir. 1931) where the facts are identical to the case at bar with the exception that in that case, the missing witnesses had not been subpoenaed but had been released under bond to appear for sentence on the day of the trial.

X.

Defendant also wishes to call the court's attention to the language of Justice Black in the case of *Green* vs. *United States* 355 U.S. 184 at middle of page 188.

XI.

Defendant says that if this case is allowed to stand that a principle of law will be established and will allow a prosecutor on a multi-count indictment to subject a defendant to a
12 second prosecution by discontinuing the trial when it appears that the first jury selected might not convict by simply stating that he is not ready to go to trial on one count of the indictment and asks a new jury for all counts, and his only excuse need be that prior to picking the first jury he had not checked all of his witnesses, and after picking the jury he had checked, found that a witness as to one count was absent and not been served with subpoena. This is not the type of "unforeseeable circumstances" arising during the first trial of a case which constitutes an exception to the rule of double jeopardy.

Wherefore, premises considered, defendant, Raymond Downum, asks the trial court to dismiss the case and discharge him.

GROCE & HEBDON,
By RICHARD TINSMAN,
Attorneys for defendant.
911 Frost Bank Building, San Antonio, Texas.

16 In United States District Court, Western District of Texas, San Antonio Division

Number 22115 Criminal

UNITED STATES OF AMERICA

vs.

RAYMOND DOWNUM, ET AL

Transcript of proceedings and of the evidence of April 25, 1961.

17 TUESDAY, APRIL 25, 1961

MORNING SESSION

(A jury was duly empaneled and sworn.)

The COURT. Ladies and gentlemen, you are members of Jury Number 4, and during the trial of this case you will be permitted to separate, but you must not discuss the facts of this case among yourselves until after the Court has charged you. You must not discuss the facts with anyone during the trial or permit anyone to discuss the facts within your hearing. You will have no conversation about any matter whatsoever—I mean that literally—with any attorney in the case either for the Government or the defendant, or with the defendant or any witness in the case.

It will be necessary for me to put you to the inconvenience of coming back at 2:00 o'clock this afternoon.

Those of you who were summoned for jury service and who were not on the first jury selected this morning, which is Jury Number 3, or the jury in the box, will be excused until tomorrow morning at 9:00 o'clock. I suggest each of you give the Marshal your phone number so that if the case is pro-

18 longed you will be notified this afternoon, in order to save you a useless trip. So you will be excused now.

TUESDAY, APRIL 25, 1961
AFTERNOON SESSION

Colloquy between Court and counsel

The COURT. Mr. Tinsman, in your case the Government's key witness is not here. They announced ready and didn't have the witness when they announced. So I am going to discharge this jury from this case, and pass it.

Mr. TINSMAN. Is it permissible to tell me who the Government's key witness is that's missing?

Mr. MCDONALD. Mr. Rutledge, one of the named payees in the indictment. It is Counts 6 and 7 of the indictment.

Mr. TINSMAN. Well, are you unable to find him?

Mr. MCDONALD. We have been unable to have the subpoena served at the present time.

Mr. TINSMAN. Your Honor, I feel this way. In view of the fact this is only as to two counts of the indictment, and there are still, as to Raymond Downum, four other counts, and in view of the fact the Government announced ready and we picked the jury, that we should go forward at this time on the counts that I assume they are ready on—the other counts.

The COURT. Do you want to have two trials?

19 Mr. TINSMAN. At this time, Your Honor, I think I am in the position that I would just as soon have two trials. I picked a jury and I think it's a satisfactory jury.

The COURT. I am not willing to have two trials. It will take too much time of the Court. The Government shouldn't have picked a jury when they weren't ready. Unfortunately, they didn't check up on the witnesses.

Motion to dismiss Counts 6 and 7 and denial thereof

Mr. TINSMAN. Let me make a motion at this time to dismiss Counts 6 and 7 for want of prosecution.

The COURT. Those are the two counts?

Mr. TINSMAN. Yes, sir.

The COURT. I will overrule the motion because they expect to give you a trial later this week or next week.

Mr. TINSMAN. All right, sir.

The COURT. So when the jury comes in I will just discharge them from this case and may use them in another case. Is your defendant on bond?

Mr. TINSMAN. No. The defendant is in the county jail.

The COURT. Take charge of him, Mr. Marshal.

(Which were all the proceedings had on the 25th day of April, 1961, in cause styled United States vs. Raymond Downum, Criminal Number 22155, in the San Antonio Division of said court.)

20 In United States District Court, Western District of Texas, San Antonio Division

Number 22115 Criminal

UNITED STATES OF AMERICA

vs.

RAYMOND DOWNUM, ET AL.

Transcript of proceedings and of the evidence of April 27, 1961

Be it remembered that on the 27th day of April, 1961, in the San Antonio Division of the United States District Court, Western District of Texas, before the Honorable Ben H. Rice, Jr., Judy of said Court, and a duly empaneled jury, there came on for trial the above styled and numbered cause, whereupon the following proceedings were had and the following evidence introduced:

Appearances: Mr. John W. McDonald, Assistant United States Attorney, Waco, Texas, appearing on behalf of the Government; Mr. Richard Earl Tinsman, Eskridge, Groce & Hebdon, San Antonio, Texas, appearing on behalf of the Defendants.

21 THURSDAY, APRIL 27, 1961

AFTERNOON SESSION

Colloquy between Court and counsel

Mr. MCDONALD. We'd like to call Number 22115, *United States* vs. *Raymond Downum*.

The COURT. Mr. Tinsman, are you ready?

Mr. TINSMAN. Before we proceed, I have a motion on the basis of former jeopardy, and I have a case on all fours.

The COURT. Let me see it.

Mr. TINSMAN. I just got here, Your Honor. It's 48 Fed. 2nd. If I can go into the library a moment——

The COURT. All right. Call the first 28 jurors.

(Thereupon a jury was duly empaneled and sworn.)

The COURT. Ladies and gentlemen, you are members of Jury Number One. During the trial of this case you will be permitted to separate. You must not discuss the facts of this case among yourselves until you receive the Court's charge at the end of the trial, and you must not discuss this case with anyone else at any time during the trial until after the verdict is rendered. You will have no conversation about any matter whatsoever with any attorney for the Government or the attorney for the defendant, or with the defendant or any witness in the case for either side. In other words, you are here to try this case from the evidence adduced from this witness stand and this witness stand alone. You will be excused until 9:00 o'clock tomorrow morning. Mr. Tinsman, you will be excused until tomorrow morning at 9:00 o'clock.

Mr. TINSMAN. When can I develop my bill, Your Honor?

The COURT. You can't develop it this afternoon anyway.

(Thereupon this case was recessed until 9:00 a.m., Friday, April 28, 1961.)

FRIDAY, APRIL 28, 1961
MORNING SESSION

The COURT. Mr. McDonald, are you gentlemen ready in the Downum case? Subject to your motion, you are ready?

Mr. TINSMAN. Subject to my motion, I am ready, and we invoke the rule.

The COURT. All right. Call your witnesses, please, gentlemen.

* * * * *

49 CLARENCE D. RUTLEDGE, a witness called by the Government, having been duly sworn, testified as follows:

Direct examination by Mr. MCDONALD:

Q. Would you state your name, please?

A. Clarence D. Rutledge, sir.

Q. And what kind of work do you do?

A. I am a commercial photographer, sir.

Q. And how long have you been engaged in that work or occupation?

A. Oh, about ten years, sir.

Q. And expressly and specifically, what do you do as a commercial photographer?

A. I make large groups of Army installations, and high school senior classes of all the large high schools all over the State of Texas.

50 Q. Mr. Rutledge, where were you Sunday, and Monday, and Tuesday of this week?

A. I was in Big Spring, Texas, sir, Big Spring and Snyder.

Q. You go from town to town taking pictures of school groups; is that correct?

A. Yes, sir.

Q. All right, sir. Now, where do you live?

A. 447 Schley Avenue, sir.

Q. I hand you what has been marked for identification as Government's Exhibit Number 5, and ask you to look at that, and see if you can identify it?

A. Yes, sir. That's my compensation check that I receive each month from World War I.

Q. And are you the named payee on that check?

A. Yes, sir, Clarence D. Rutledge.

Q. Did you receive that particular check?

A. No, sir, I did not.

Q. Did you receive any of the proceeds from that check?

A. No, sir.

Q. Did you place any of the names that appear on the back of that check—did you place them there?

A. No, sir.

Q. Did you authorize anyone else to place your name on the back of that check?

A. I did not, sir.

Q. And did you authorize anyone else to cash your check?

51 A. I have never authorized anyone to cash my Government checks, sir.

Mr. McDONALD. Pass the witness, Your Honor.

Cross-examination by Mr. TINSMAN:

Q. Mr. Rutledge, are you married, sir?

A. Yes, sir.

Q. Did your wife know that you would be in town on Wednesday morning?

A. This Wednesday?

Q. Yes, sir.

A. No, sir, she did not.

Q. When did she expect you in, sir?

A. Well, she never expects me in until I notify her that I am coming in.

Q. Did she know where you were at all times?

A. She never knows where I am at all times.

Q. Did you call into her on Monday night or Tuesday night, or at any time Monday or Tuesday?

A. I did not.

Q. When is the first time that you came into San Antonio?

A. The first time?

Q. Yes, this week.

A. Yesterday morning.

52 Q. Thursday morning.

A. Thursday morning.

Q. Did you call in to your wife any time previous to that time as to when you'd be in town?

A. No sir. I wasn't expected to come in until the 25th of May.

Q. Had you been planning on making this trip?

A. Certainly not.

Q. In other words, you left on Monday unexpectedly?

A. I left where on Monday?

Q. In other words, you live in San Antonio, don't you?

A. That's right.

Q. What day did you leave San Antonio?

A. I will have to think. It has been more than a month ago. I left for Laredo about a month ago, and from there I went to El Paso, direct from Laredo.

Q. And your wife knew that you were not expected to be in until the 25th?

A. That's true.

Mr. TINSMAN. That's all.

Redirect examination by Mr. MCDONALD:

Q. You mean the 25th of May?

A. 25th of May, sir.

Q. What occasioned your return?

A. Beg your pardon?

53 Q. How come you returned to San Antonio?

A. I was contacted by the officers of the Court. They told me to come in, sir; either come in, or they'd send and get me.

Q. And you were contacted by telephone, weren't you?

A. Yes, I was contacted in Big Spring, Texas, by telephone, sir.

Q. All right, sir.

Mr. MCDONALD. No further questions.

Recross examination by Mr. TINSMAN:

Q. How long had you been in Big Spring when you were contacted?

A. I had arrived in Big Spring Saturday morning about 10:00 o'clock, sir, from El Paso.

Q. So you were in Big Spring from Saturday until Wednesday; is that correct?

A. Well, I was in Big Spring, Odessa, and Snyder. Now, Odessa is about 60 miles from Big Spring, and Snyder is 48 miles from Big Spring.

Q. What days were you in Big Spring, though, is my question, sir?

A. Saturday. Saturday morning I arrived at Big Spring from El Paso.

Q. And how long did you—in other words, is that the only time you were in Big Spring, or what other days were you in Big Spring?

A. I was in Big Spring Saturday, Sunday and Monday.

Q. And then you were back in Big Spring on Wednesday?

A. Wednesday. I left Big Spring Wednesday, yes, sir.

54 Q. In other words, that's when the Government contacted you?

A. That's true.

Mr. TINSMAN. That's all.

Mr. MCDONALD. No further questions, Your Honor.

* * * * *

171 (The Clerk reads the verdict of the jury.)

The COURT. Ladies and gentlemen, your verdict will be received and filed with the Clerk, and you will be discharged from this particular case and excused until 9:00 o'clock next Monday morning.

(Thereupon the jury retired.)

Colloquy between Court and counsel

The COURT. Mr. Tinsman, is the defendant on bond?

Mr. TINSMAN. No, sir.

The COURT. Well, I'll set the sentence for 2:00 o'clock Monday afternoon, provided I get a report. All right, Mr. Tinsman; it will be 2:00 o'clock Monday afternoon.

172 Mr. TINSMAN. May I make my bill at this time?

The COURT. Yes, sir, if you can get through by 5:00 o'clock, you can.

Mr. TINSMAN. Yes, sir, I think I can.

I think it is shown in the record that the jury that tried and convicted Raymond Downum just now was a different jury than the first jury that was empaneled and sworn.

The COURT. At least, in part, it was, I think.

Mr. TINSMAN. Sir?

The COURT. I say it was in part, anyway. You checked that list. You ought to know.

Mr. TINSMAN. There may be one or two on the same list, but the majority of the people were not on the first jury, and the first jury was discharged. I think that's——

The COURT. There is no question about that.

Mr. TINSMAN. All right, sir. I'd like to ask Mr. McDonald if prior to the time that he empaneled the first jury if he ascer-

tained whether Mr. Rutledge had been served with a subpoena, if he attempted to ascertain this from the Marshal's office.

Mr. McDONALD. Your Honor, I attempted to determine that. I believe, the day prior to the setting of this case, and I was informed that they had contacted the witness's wife, and that she was going to inform them of his whereabouts, and the Court is well familiar with the 12 cases that were

173 set for call all at one time, I believe. I'd like the record to reflect this, that 12 cases were set for call, and the United States Attorney's office was notified of that, I believe, on Wednesday, or possibly Thursday——

The COURT. You mean before they were to be called on Monday?

Mr. McDONALD. That's right, Your Honor. In the 12 cases there were approximately a hundred witnesses to be called; that is an estimate on my part. And the subpoenas were gotten out, all of the subpoenas on the witnesses were gotten out, given to the Marshal, and with the large number of supoenas that we had out, and also trying some cases, I found it impossible to ascertain if every witness was here at a particular time; and I did check with the Marshal, I think, the day before, and received the information that the wife was going to let me know where her husband was, if she could find out, and due to the pressing of business, I was unable to check immediately at the time of trial.

I would state further for the purpose of the record that this defendant was never arraigned in the presence of the jury. I believe the record will reflect that.

The COURT. I think you are both agreed on that.

Mr. TINSMAN. That's right. He was arraigned in the presence of the Court some date prior to the selection of the jury.

The COURT. That's true.

174 Mr. TINSMAN. So, then, from what you said, Mr. McDonald, I think it is correct then you did not, regardless of what the reasons were, you did not check with the United States Marshal's office very shortly prior to picking the Jury Number 1 in this case, to ascertain whether the subpoena was served on Mr. Rutledge; is that correct?

Mr. McDONALD. I stated I checked the day before.

Mr. TINSMAN. I mean immediately prior.

Mr. MCDONALD. No, I checked the day before.

Mr. TINSMAN. There was nothing that prevented you from—you or having someone else in your office check with the United States Marshal's office, which is located directly across the hall from your office, if you had so desired, is there?

Mr. MCDONALD. Yes, I was in another case that morning of that day.

Mr. TINSMAN. There are other attorneys in the office and other people that could have checked if you had asked them, aren't there?

Mr. MCDONALD. They were all tied up and all busy. We had 12 cases set.

The COURT. The Court knows that to be a fact, gentlemen, and I think you know it to be a fact that I set these cases on those gentlemen on very short notice, and every one of them was head over heels in work.

Mr. TINSMAN. Your Honor, I realize that, and I
175 think if the District Attorney had requested, which he did not do, five minute recess, so he could go check with the Marshal's office before picking a jury to ascertain whether all of his witnesses were here, or had been served——

The COURT. I am not talking about what you think. I am just talking about the facts.

Mr. TINSMAN. Isn't it true, Mr. McDonald, if someone had gone to the U.S. Marshal's office just five minutes before picking the jury, or even while it was being picked, that they could have ascertained that Mr. Rutledge's subpoena hadn't been served on him?

Mr. MCDONALD. I don't know what they would have ascertained at that time. I found out later that it had not.

Mr. TINSMAN. It obviously wouldn't have while the jury was being picked. At the time that the continuance was asked for, just prior to 2:00 o'clock, after picking the first jury, on Tuesday afternoon, April 25th, you had sufficient evidence to convict Raymond Downum as to Counts 3, 4, 5, and 8, in your opinion, did you not?

Mr. MCDONALD. At that time it was my opinion that this was a necessary witness.

Mr. TINSMAN. You didn't answer my question, sir. In your opinion, did you have sufficient evidence to convict Raymond Downum as to Counts 3, 4, 5, and 8?

The COURT. You mean by that did he have witnesses
176 present?

Mr. TINSMAN. Witnesses present and ready to testify.

Mr. McDONALD. No, I did not have sufficient witnesses present to convict at that time on those counts.

Mr. TINSMAN. Didn't you announce to the Court, sir, the only witness that was absent, and the only reason you were asking for the continuance was because of the absence of Clarence Rutledge?

Mr. McDONALD. That's true.

Mr. TINSMAN. Is he the only witness that was absent?

Mr. McDONALD. That's right.

Mr. TINSMAN. Is he the only reason you asked——

Mr. McDONALD. That is right.

Mr. TINSMAN. And it is your testimony that without his testimony, you could not have convicted as to Counts 3, 4, 5, and 8?

Mr. McDONALD. That's right.

Mr. TINSMAN. Even though in the actual trial, he never testified as to any of those counts?

Mr. McDONALD. Yes, he did. He was the named payee under Count 3.

Mr. TINSMAN. No, "6" and "7", sir.

Mr. McDONALD. Let me check that. That's right; it is "6" and "7". Oh, you did not include the ones we con-
177 victed on?

Mr. TINSMAN. I asked could you convict on Counts 3, 4, 5, and 8? In your opinion did you have sufficient evidence, that if the jury believed your witnesses——

Mr. McDONALD. I possibly could.

The COURT. Talk out loud. You are talking to the Court, not yourselves. Raise your voices.

Mr. McDONALD. In my opinion at that time Mr. Rutledge was the named payee on a check in Counts 6 and 7 of the indictment, and I was a while ago thinking he was a named payee in "1," "2," and "3," but I was mistaken about that. It

was my opinion that under the entire indictment, we could not safely go to trial on this case without the attendance of this witness, since that check is the one that—a witness that cashed the check could positively identify the defendant as being the one that signed it in his store and cashed it.

Mr. TINSMAN. If you had checked with the Marshal's office and found the subpoena was unserved, and found Mr. Rutledge had not been here prior to picking the jury, would you have announced not ready at that time?

Mr. MCDONALD. I don't know what I would have done. I believe that I would have asked that the case be passed to some future date, or at least if I had known that, and had had that information, I think that I would have asked that we not go to trial.

178 The COURT. You mean you wouldn't have announced ready for trial?

Mr. MCDONALD. That's right.

Mr. TINSMAN. The only thing that prevented you from obtaining that information is the fact that you and your office were busy, and you considered other things of more importance than obtaining that information.

Mr. MCDONALD. No, I would say that I and all other members of our office were swamped, and we had something to do every second of the time.

Mr. TINSMAN. How many attorneys are in your office, sir?

Mr. MCDONALD. Actually, at that time, trying cases, two.

Mr. TINSMAN. I didn't ask you that. I asked you how many attorneys were in the office that you could have, if you had to,——

Mr. MCDONALD. Actually, the chief United States Attorney, Mr. Wine, Mr. Key Hoffman and myself were the only ones that were present that week.

Mr. TINSMAN. How about Mr. Luetheke?

Mr. MCDONALD. He was not there. He was on leave at that time for attendance in connection with military service.

Mr. TINSMAN. And, in addition, in your office how many secretaries do you have in the San Antonio office?

179 Mr. MCDONALD. I believe there are five. Of course, about three of those do nothing but maintain the rec-

ords. This is the main office for the United States Attorney for the entire Western District of Texas, and about three of them are constantly engaged in the maintaining of records for the Western District.

Mr. TINSMAN. It is true that at least one secretary helps in the courtroom at times; is that correct?

Mr. MCDONALD. At times.

Mr. TINSMAN. I think we brought this out, that the U.S. Marshal's office is directly across the hall from your office.

Mr. MCDONALD. That's a fact.

Mr. TINSMAN. And you knew on Monday that there was some possibility that Mr. Rutledge might not be here, didn't you?

Mr. MCDONALD. Only a very meager possibility. I assumed, since his residence was San Antonio, and they had contacted his wife, that without a doubt he would be located and would be served.

Mr. TINSMAN. But this was not exactly a completely unforeseeable circumstance?

Mr. MCDONALD. It was on my part at the time of the selection of this jury, yes.

Mr. TINSMAN. But the reason it was unforeseeable was because you didn't take the trouble to go and find out; isn't that correct?

180 Mr. MCDONALD. No, it is not. It is because I did not have the opportunity and the time to.

The COURT. Put that loudspeaker before you. You don't raise your voice. You keep it down.

Mr. TINSMAN. Did you make any request to the Court to attempt to find whether your witnesses were there?

Mr. MCDONALD. I believe the record will reflect that I did not. I will state this: This particular case is Number 10 on the list of settings, and I could not foresee that it would come up for trial on the second day of the settings.

Mr. TINSMAN. Well, it's true that you could foresee it just as well as defense counsel could foresee it, isn't it?

Mr. MCDONALD. I will ask you there, how many witnesses did you have to call, and how many cases did you have set over here?

Mr. TINSMAN. This was the only case that I had set besides a guilty plea.

Mr. MCDONALD. All right. I don't believe there is any comparison there.

Mr. TINSMAN. Isn't it true, Mr. McDonald, that by not checking, you took a chance that Mr. Rutledge might not be here, however slim you may have considered that chance?

Mr. MCDONALD. That is not a question that suggests
181 itself to answering. There was a possibility, or there is no doubt that it was a chance, but the question is whether it was a foreseeable contingency under the circumstances, and I think it was not.

Mr. TINSMAN. If someone had checked with the Marshal's office from your office, regardless of who that person might have been, prior to your picking the jury, or during the time you picked the jury, then it would have no longer been unforeseeable; isn't that correct?

Mr. MCDONALD. Actually, when you say "if," it is pretty hard to determine ahead of time what the circumstance is. If you just didn't have a chance to do it, and don't have time to do it, you couldn't check, but as it was proven out, the subpoena was not served, and we could have found out about it if we had had an opportunity and time to check it, along with about ninety-some-odd others.

Mr. TINSMAN. I think that's all, Your Honor.

The COURT. All right. Now, to preserve your record I would suggest you file your motion for judgment for the reasons that you are contending. I won't——

Mr. TINSMAN. Well, if the Court please, I am going to file a motion for acquittal, which will, as the Court stated, be taken as presented before the second trial, on the ground that the defendant has been placed in double jeopardy. I filed an oral motion——

The COURT. I didn't say before the second trial. It can be filed as of before the beginning of this trial.

182 Mr. TINSMAN. Well, this is the second trial.

The COURT. I don't think so. I'm not agreeing with you on that.

Mr. TINSMAN. All right, sir. But you are agreeing that I may file as of before this trial was——

The COURT. Before this jury was selected; it can be filed as of that date. What I am trying to suggest is that you don't overlook the fact that you're going to have to file a motion for new trial or something to keep this time from creeping up on you.

Mr. TINSMAN. Yes, sir.

The COURT. It may be that you'll have to file a motion for new trial in skeleton form and ask leave to amend it later; I don't know.

Motion for new trial

Mr. TINSMAN. All right, sir. To protect my rights, then, at this time I will file a motion for new trial.

The COURT. All right.

* * * * *

183 *Transcript of sentencing proceedings*

Be it further remembered that on the 1st day of May, 1961, at 2:00 p.m., in the San Antonio Division of the United States District Court, Western District of Texas, before the H n. Ben H. Rice, Jr., Judge of said court, the above named defendant was called for sentencing, whereupon the following proceedings were had:

Appearances: Mr. K. Key Hoffman, Jr., Assistant United States Attorney, San Antonio, Texas, appearing on behalf of the Government; Mr. Richard E. Tinsman, San Antonio, Texas, appearing on behalf of the Defendant.

SAN ANTONIO, TEXAS, MONDAY, MAY 1, 1961

AFTERNOON SESSION

Mr. HOFFMAN. We will call next for sentencing Raymond Downum.

The COURT. Counsel, anything you wish to say now on behalf of your client?

Mr. TINSMAN. Yes, sir.

The COURT. All right, sir.

Mr. TINSMAN. I'd like to renew the plea of former
184 jeopardy that we previously filed here, Your Honor, at this time.

The COURT. All right. I've already overruled the plea.

Mr. TINSMAN. Yes, sir. I'd like to give the Court a chance to reconsider that.

The COURT. Well, I'll reconsider it later. I'll go ahead and sentence him now.

Mr. TINSMAN. All right, sir. There is nothing else I have to say.

The COURT. Mr. Downum, anything you wish to say in your own behalf before I pass sentence in your case?

The DEFENDANT. No, sir.

The COURT. You have a record here of arrests, November 18, '55, to date, consisting of arrests for theft, vagrancy, investigation for forgery, and swindling under $50; no disposition. Now, November 14th, 1958, in Bexar County, you were sentenced by the state court to serve two years in Texas penitentiary for forgery, and you were released without supervision on April 18, 1960. Is that correct?

The DEFENDANT. Yes, sir.

The COURT. On Counts 3, 4, 5, 6, and 7, you were convicted on those counts, I am going to sentence you to serve eight years on all of those counts generally. And on Count
185 8 that you were convicted of, I'm going to sentence you to serve five years, to run concurrently with the sentence imposed under Counts 3, 4, 5, 6, and 7. That's all.

187 In the United States District Court For the Western District of Texas, at San Antonio Division

Number 22115 Criminal

Verdict of the Jury in the Case of

UNITED STATES OF AMERICA

vs.

RAYMOND DOWNUM

Filed April 28, 1961

We, the jury, find the defendant Raymond Downum guilty as charged in the third count of the indictment; guilty as charged in the fourth count; guilty as charged in the fifth count; guilty as charged in the sixth count; guilty as charged in the seventh count; and guilty as charged in the eighth count thereof.

G. P. PARISH,
Foreman.

189 In United States District Court, Western District of Texas, San Antonio Division

[Title omitted.]

Renewal of plea of former jeopardy

Filed April 28, 1961

Now comes Raymond Downum prior to sentence being imposed after his conviction on all six counts of the indictment by the second jury impaneled and sworn herein, which jury was from a different panel from the first jury which was sworn in in his case, and had different members on it than the first jury in this case, and renews his plea of former jeopardy made prior to impaneling the second jury in this case, and asks the court to take into consideration the remarks of Mr. McDonald, U.S. Prosecutor, in this case adduced in open court after the jury had returned its verdict of guilty on all six counts, would show to the court that Mr. McDonald's statements clearly show that there was no "unforeseen circumstances" requiring the discharge of the first jury which was duly impaneled and sworn to try Raymond Downum, and further says it would be an

abuse of this court's discretion to fail to grant the Plea of Former Jeopardy of Raymond Downum.

GROCE & HEBDON,
By RICHARD TINSMAN,
Attorneys for defendant.
911 Frost Bank Building, San Antonio, Texas.

191 In United States District Court, Western District of Texas, San Antonio Division

No. 22115 Criminal

UNITED STATES OF AMERICA

vs.

JUAN R. CAMPOS, RAYMOND DOWNUM, RONNIE HECK, AND RAYMOND HECK

Judgment and sentence

On the 27th day of April, 1961, this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, Raymond Downum, in his own proper person and by counsel, and thereupon a jury, to-wit: George R. Parish and eleven others, was duly selected, empaneled and sworn, after both parties announced ready for trial. And on the 28th day of April, 1961, said defendant was arraigned at the bar of the court, and in open court, pleaded not guilty to the charges contained in the third, fourth, fifth, sixth, seventh and eighth counts of the indictment herein. And said jury having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterwards were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is now here entered upon the minutes of the court, to-wit:

"Verdict of the Jury in the Case of *United States of America* vs. *Raymond Downum*, Number 22115 Criminal

> We, the jury, find the defendant Raymond Downum, guilty as charged in the third count of the indictment; guilty as charged in the fourth count; guilty as charged in the fifth count; guilty as charged in the sixth count; guilty as charged in the seventh count; and guilty as charged in the eighth count thereof.
>
> G. R. PARISH,
> *Foreman.*"

Wherefore, it was considered and adjudged by the Court that the defendant, Raymond Downum, is guilty, as found by the jury, of the offense of having, on or about December 3, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, acting jointly and severally with others, with intent to defraud the United States, knowingly and wilfully uttered as true a check described as follows:

> "Check No. 15,676,363 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Dolores M. Cameron, in the sum of $56.30."

then knowing the endorsement thereon to be forged, as charged in the third count of the indictment; and

of the offense of having, on or about December 6, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Jayme J. Maltsberger, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit, $58.00, which said check is described as follows:

> Check No. 15,443,535 drawn on the Treasurer of the United States, dated December 3, 1960, issued at Kansas City, Missouri, over Symbol No. 3100, payable to the order of Jayme J. Maltsberger, in the sum of $58.00.

as charged in the fourth count; and

192 of the offense of having, on or about the time and place and within the jurisdiction, all as set out in the fourth count of the indictment, acting jointly and severally with

others, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the fourth count of the indictment, then knowing the endorsement thereon to be forged, as charged in the fifth count; and

of the offense of having, on or about December 1, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, with intent to defraud the United States, knowingly and fraudulently made and forged the name of the payee, to-wit, Clarence D. Rutledge, upon the back of a check drawn on the Treasurer of the United States, for the purpose of obtaining and receiving from the United States a certain sum of money, to-wit $19.00, which said check is described as follows:

> Check No. 1,624,541 drawn on the Treasurer of the United States, dated November 30, 1960, issued at Dallas, Texas, over Symbol No. 3110, payable to the order of Clarence D. Rutledge, in the sum of $19.00.

as charged in the sixth count; and

of the offense of having, on or about the time and place and within the jurisdiction, all as set out in the sixth count of the indictment, with intent to defraud the United States, knowingly and wilfully uttered as true the check described in the sixth count of the indictment, then knowing the endorsement there on to be forged, as charged in the seventh count; and

of the offense of having, on or about the time and place and continuing to and through December 28, 1960, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, acting jointly and severally with others, unlawfully, knowingly and wilfully combined, conspired, confederated and agreed to commit offenses against the United States of America, the exact date of the formation of the conspiracy and its termination being unknown, to-wit, to knowingly and unlawfully steal from a house letter box a letter and to remove from such letter a check drawn on the Treasurer of the United States; to knowingly and fraudulently make and forge the name of the payee upon the back of a U.S. Treasury Check for the purpose of obtaining and receiving from the United States a certain sum of money; and to knowingly and wilfully utter as true the check described knowing the endorse-

ment thereon to be forged, and pursuant to said conspiracy, and to effect the objects thereof, committed one or more of the overt acts charged in the eighth count of the indictment, as charged in the eighth count thereof.

Thereupon sentence was temporarily deferred.

Now, on this the 1st day of May, 1961, said defendant coming into open court for the purpose of sentence and being asked by the Court if he had anything to say why the sentence of the law should not be pronounced against him, and he answering nothing in bar thereof:

It is the order and sentence of the Court that the defendant, Raymond Downum, for the said offenses by him committed and charged in the third, fourth, fifth, sixth and seventh counts of the indictment, be imprisoned for the period of eight (8) years in an institution to be designated by the Attorney General of the United States, and for the said offense by him committed and charged in the eighth count of the indictment, be imprisoned for the period of five (5) years in an institution to be designated by the Attorney General of the United States, said sentence of the imprisonment imposed under said eighth count to run concurrently with the sentences of imprisonment imposed under the third, fourth, fifth, sixth and seventh counts of the indictment, and that said defendant be, and he is hereby committed to the custody of said Attorney General or his authorized representative.

193 The Clerk will provide the United States Marshal with a certified copy of the Judgment and Sentence.

Ordered in open court at San Antonio, Texas, this the 1st day of May, 1961.

BEN H. RICE, Jr.,
United States District Judge.

Approved:

RUSSELL B. WINE,
United States Attorney.

By ——— ———
Assistant U.S. Attorney.

Entered: Minute Volume C-2 page 226.

201 In United States District Court, Western District of Texas, San Antonio Division

[Title omitted.]

Order denying plea of former jeopardy

May 24, 1961

On the 22nd day of May, 1961, came on to be heard Plea of Former Jeopardy filed herein by the Defendant, Raymond Downum, and the Court after hearing argument of counsel is of the opinion that the plea should be overruled.

It is therefore ordered that the Plea of Former Jeopardy filed herein by the Defendant, Raymond Downum, be, and the same is hereby, denied.

Entered at San Antonio, Texas, this 24th day of May, 1961.

BEN H. RICE, Jr.,
United States District Judge.

216 In United States District Court, Western District of Texas, San Antonio Division

[Title omitted.]

Transcript of proceedings of April 19, 1961

Be it remembered that on the 19th day of April, 1961, in the San Antonio Division of the United States District Court, Western District of Texas, before the Hon. Ben H. Rice, Jr., Judge of said court, the above named defendants were called for arraignment, whereupon the following proceedings were had:

Appearances: Mr. John W. McDonald, Assistant United States Attorney, Waco, Texas, appearing on behalf of the Government; Mr. Richard E. Tinsman, San Antonio, Texas, appearing on behalf of Raymond Downum; Mr. Otis A. West, San Antonio, Texas, appearing on behalf of Juan R. Campos; Mr. Lloyd L. Oubre, San Antonio, Texas, appearing on behalf of Ronnie Heck.

217 *Proceedings on arraignment*

SAN ANTONIO, TEXAS

WEDNESDAY, APRIL 19, 1961, 2:00 P.M.

Mr. McDONALD. May it please the Court, we'd like to call Number 22115, Juan R. Campos, Raymond Downum, and Ronnie Heck.

The COURT. Who is this lady; what is she doing up here?

Mrs. PEARL A. MASON. Mr. West has gone to court; I wasn't able to locate him.

The COURT. Speak out loud; I can't understand you.

Mrs. MASON. Mr. West has gone to court.

The COURT. Mr. Who has gone to court?

Mrs. MASON. Otis West.

The COURT. Mr. West?

Mrs. MASON. Yes, sir, Mr. Otis West.

The COURT. Is he a lawyer here?

Mrs. MASON. Yes, he is.

The COURT. Who does he represent?

Mrs. MASON. This defendant.

The COURT. When did you employ him?

Mrs. MASON. He came in just about 1:15, Your Honor, this afternoon, and I am in the office. I'm Pearl Mason.

The COURT. Are you an attorney?

Mrs. MASON. Yes, I am, Judge.

The COURT. Admitted to practice in this court?

218 Mrs. MASON. I was admitted in '27, in all the courts.

The COURT. Have you been admitted to practice in federal court?

Mrs. MASON. Many years ago.

The COURT. In this court?

Mrs. MASON. I think so. I was admitted in North Carolina in '27.

The COURT. In the federal court in North Carolina?

Mrs. MASON. Yes, sir, but I am only here for Mr. West, because I wasn't able to locate him.

The COURT. In other words, you were not employed?

Mrs. MASON. No, sir.

The COURT. You can't come up here representing a man who has not employed you. It will be up to Mr. West, if he accepted employment, to come down here. Mr. Marshal, will you tell Mr. West to come here immediately, please? We'll go ahead with the other two.

Mr. MCDONALD. Which one of you is Raymond Downum?

RAYMOND DOWNUM. I am.

Mr. MCDONALD. And you are Ronnie Heck?

RONNIE HECK. Yes.

Mr. MCDONALD. Now, Mr. Downum,——

(Mr. West comes forward.)

The COURT. Is this Mr. West?

Mr. WEST. Yes, sir.

219 The COURT. Why didn't you come forward a moment ago?

Mr. WEST. I didn't know about this case, Your Honor. This man came into my office this morning, I understand, and wanted to employ me, and he talked to one of the other attorneys in the office. And my secretary told me that he came up here with Mrs. Mason.

The COURT. Where were you when the case was called?

Mr. WEST. I was outside of the courtroom, Your Honor.

The COURT. Have you been admitted to practice before this court?

Mr. WEST. Yes, I have, Your Honor.

The COURT. All right.

Mr. MCDONALD. You are Juan R. Campos?

JUAN R. CAMPOS. Yes.

Mr. MCDONALD. And are you representing Mr. Campos, Mr. West?

Mr. WEST. I assume I am, sir. I haven't even talked to the man. He came in my office and said he's been referred to me by someone. This is the first time I've ever seen the gentleman.

The COURT. You're up here appearing for him, so you're his attorney.

Mr. WEST. Yes, sir; I'll represent him.

The COURT. How about the other two?

Mr. MCDONALD. Now, Mr. Campos, you are charged with the violation of the postal laws and theft of letters from

220 mail boxes and forging and cashing checks, Government checks, after they were taken from mail boxes. Now, you are charged in Count One with theft, Counts Three and Five with passing the checks, one in the amount of $56.30 made payable to Delores M. Cameron, and another one in the amount of $19 made payable to Clarence D. Rutledge. And under Count Eight, you are charged with conspiring and planning to steal these checks and cash them. You all three are charged with that. Now, the maximum punishment that may be given upon a plea of guilty or being found guilty under Count One is $2,000 fine or five years in prison or both; under Counts Three and Five, the maximum punishment that may be assessed is $1,000 fine or ten years in prison or both. And under Count Eight, a maximum fine of $10,000 or five years in prison or both.

And, Mr. Downum, you are charged under Counts Three, Four, Five, Six, Seven, and Eight. The maximum punishment that may be assessed under those counts, under Three, Four, Five, Six, and Seven is $1,000 fine or ten years in prison or both. Under Count Eight, $10,000 fine or five years in prison or both.

Now, Ronnie Heck, you are charged——

The COURT. What are those counts he's accused of, the offenses?

Mr. MCDONALD. Your Honor, Count Three is the uttering of a check and the passing of a check knowing it was

221 forged; Count Four is the forgery of a check in the amount—made payable to Jayne J. Maltsberger, in the sum of $58; and Count Five is the passing of that same check; and Count Six is the forgery of a check in the amount of $19, made payable to Clarence D. Rutledge; and Count Seven is the passing of that check. Count Eight is a conspiracy count alleging that they entered into a conspiracy to steal and cash these checks.

The COURT. You mean all three of the defendants?

Mr. MCDONALD. That's right, sir. Now, the maximum punishment under Count Number Eight is $10,000 or five years in prison or both.

Ronnie Heck, you are charged under Counts One, Two, Three and Eight.

The COURT. Five, too, I think.

Mr. MCDONALD. Two, Three, Five and Eight. Now, Count Number Two is the forgery of a check in the amount of $56.30, made payable to Delores M. Cameron; Count Number One is the theft of a check contained in a letter addressed to Delores M. Cameron; and Count Two is the forgery, and Count Three is the passing of that check. Count Five is the passing of the check made payable to Jayne Maltsberger in the amount of $58. Count Eight charges that you conspired to steal these checks and letters and pass them.

Now, under Count One, the maximum punishment
222 that may be assessed upon a plea of guilty or being found guilty is $2,000 fine or five years imprisonment; under Counts Two, Three and Five, the maximum punishment that may be assessed is $1,000 or ten years in prison or both on each of the Counts, and under Count Eight the maximum punishment that may be assessed is $10,000 fine or five years in prison or both.

Now, first, Raymond Downum, do you have an attorney?

Mr. DOWNUM. No, sir.

Mr. MCDONALD. Ronnie Heck, do you have an attorney?

Mr. HECK. No, sir.

Mr. MCDONALD. You are both advised that you have the right to have an attorney to represent you throughout all stages of these proceedings, and if you do not have funds or property with which to employ a lawyer, that the Court will appoint one for you without charge. Now, do you have any funds or property with which to employ a lawyer?

Mr. DOWNUM. No.

Mr. HECK. No, sir.

Mr. MCDONALD. Neither of you have any funds. How old are you?

Mr. HECK. 20.

Mr. MCDONALD. Now, Downum, how old are you?

Mr. DOWNUM. 21.

223 Mr. MCDONALD. And do either one of you want an attorney to represent you?

Mr. DOWNUM. Yes, sir.

Mr. HECK. Yes, sir.

The COURT. All right. Mr. Tinsman, will you represent the defendant Downum. And Mr. Oubre, will you represent the defendant Heck.

Mr. MCDONALD. May the record reflect all the attorneys have been furnished copies of the indictment. May we pass this and come back to it after the attorneys have——

The COURT. Yes; you may go outside and consult with your clients.

(Thereupon the defendants retired from the courtroom with their attorneys, and the Court proceeded with other matters. Thereupon this case was called again.)

Mr. MCDONALD. We'd like to recall Number 22115, Juan R. Campos, Raymond Downum, and Ronnie Heck.

The COURT. Have each of you gentlemen explained to your clients the maximum sentence that can be imposed on each of them under each of the counts of the indictment in the event they are convicted or plead guilty?

Mr. TINSMAN. Yes, sir.

The COURT. Do you understand the maximum punishment, Mr. Downum?

Mr. DOWNUM. Yes, sir.

The COURT. Do you understand?

Mr. HECK. Yes, sir.

224 The COURT. Do you understand?

Mr. CAMPOS. Yes.

Mr. MCDONALD. Count One concerns Juan R. Campos and Ronnie Heck.

(Thereupon Mr. McDonald read the first count of the indictment to the defendants.)

Mr. MCDONALD. To Count One of the indictment, Juan R. Campos, how do you plead?

Mr. CAMPOS. Guilty.

Mr. MCDONALD. Ronnie Heck, to Count One of the indictment how do you plead?

Mr. HECK. Guilty.

Mr. MCDONALD. Now, this Count Two concerns Ronnie Heck only.

(Thereupon Mr. McDonald read Count Two of the indictment to the defendants.)

Mr. McDONALD. To Count Two of the indictment, Ronnie Heck, how do you plead?

Mr. HECK. Guilty.

Mr. McDONALD. Count Three. This count concerns Ronnie Heck, Raymond Downum, Juan R. Campos, and Raymond Heck.

(Thereupon Mr. McDonald read the third count of the indictment to the defendants.)

Mr. McDONALD. Ronnie Heck, to Count Three of the indictment, how do you plead?

225 Mr. HECK. Guilty.

Mr. McDONALD. Juan R. Campos, to Count Three of the indictment, how do you plead?

Mr. CAMPOS. Guilty.

Mr. McDONALD. And Raymond Downum, to Count Three of the indictment, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Four, and this applies only to Raymond Downum.

(Thereupon Mr. McDonald read the fourth count of the indictment to the defendants.)

Mr. McDONALD. To Count Four of the indictment, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Five pertains to Juan R. Campos, Raymond Downum, Ronnie Heck, and Raymond Heck.

(Thereupon Mr. McDonald read the fifth count of the indictment to the defendants.)

Mr. McDONALD. Juan R. Campos, to Count Five of the indictment, how do you plead?

Mr. CAMPOS. Guilty.

Mr. McDONALD. Raymond Downum, to Count Five of the indictment, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. And Ronnie Heck, to Count Five of the indictment, how do you plead?

Mr. HECK. Guilty.

226 Mr. McDONALD. Count Six. This applies to Raymond Downum alone.

(Thereupon Mr. McDonald read the sixth count of the indictment to the defendants.)

Mr. McDONALD. To Count Six of the indictment, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Seven. This applies to Raymond Downum alone.

(Thereupon Mr. McDonald read the seven count of the indictment to the defendants.)

Mr. McDONALD. To Count Seven, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. Count Eight. This applies to all four parties.

(Thereupon Mr. McDonald read the eighth count of the indictment to the defendants.)

Mr. McDONALD. To the eighth count of the indictment, Juan R. Campos, how do you plead?

Mr. CAMPOS. Guilty.

Mr. McDONALD. To the eighth count of the indictment, Raymond Downum, how do you plead?

Mr. DOWNUM. Not guilty.

Mr. McDONALD. To the eighth count of the indictment, Ronnie Heck, how do you plead?

227 Mr. HECK. Guilty.

The COURT. Now, Campos, to those counts of the indictment to which you've pled guilty, did you enter your plea of guilty solely because you are guilty?

Mr. CAMPOS. Yes, sir.

The COURT. Not because of any persuasion or promises made to you?

Mr. CAMPOS. No, sir.

The COURT. Not because of any fear or threats made against you?

Mr. CAMPOS. No.

The COURT. Downum, as to those counts to which you've entered a plea of guilty——

Mr. DOWNUM. I have not entered a plea of guilty.

The COURT. You have not entered a plea of guilty?

Mr. TINSMAN. No, sir.

Mr. MCDONALD. He pled not guilty to all counts on which he was charged.

The COURT. I thought on Count Three he pled guilty.

Mr. TINSMAN. No, sir. Not guilty as to all counts.

* * * * *

231 In the United States Court of Appeals for the Fifth Circuit

No. 19033

Argument and Submission—November 22, 1961.

RAYMOND DUWNUM

v.

UNITED STATES OF AMERICA

On this day this cause was called, and after argument by Richard Tinsman, Esquire, for Appellant, and John W. McDonald, Esquire, Assistant United States Attorney, for Appellee, was submitted to the Court.

232 [File endorsement omitted.]

In the United States Court of Appeals for the Fifth Circuit

No. 19033

RAYMOND DOWNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Texas

Opinion of the Court - March 9, 1962

Before JONES, BROWN and GEWIN, Circuit Judges.

BROWN, Circuit Judge: This appeal brings into consideration the effect of the double jeopardy provision of the Fifth

Amendment of the Constitution.[1] Our view of the circumstances of this case is that this constitutional guarantee has not been infringed by Downum's trial and conviction. We therefore affirm.

233 The facts are simple and undisputed. The problem concerns their legal significance. On April 19, 1961, Downum was arraigned in open court on an indictment of six counts relating to stealing, forging, and passing Government checks, and conspiracy to commit those acts, 18 USCA §§ 1708, 495 and 371. Downum entered a plea of not guilty on all counts while his codefendants pleaded guilty. This was done prior to the selection or impaneling of the jury.

On April 25, 1961, the case was called for trial. Both sides announced ready and a jury was selected and sworn in the morning. The jury was directed to return in the afternoon after being instructed not to discuss any phase of the case. At 2:00 o'clock that afternoon, the Judge announced from the bench that he had been advised by the prosecutor that since a material witness was not present, the trial could not proceed.[2] Despite objection by Downum, the jury was then called into the courtroom and discharged.

On April 27, 1961, two days later, and over Downum's plea of former jeopardy, a new jury was selected. Downum, convicted on all six counts, was sentenced to eight years on five counts to run concurrently, and five years on the sixth count to run concurrently with the other counts.

Downum now vigorously presses the single point of error that his conviction by the second jury was illegal because
234 he was placed in jeopardy when the first jury was

[1] "* * *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" U.S. Const. Amend. V.

[2] The absent witness was to give evidence on two counts of the six-count indictment. The reason for his absence was that he had not been subpoenaed as he had been out of town. This was brought to the prosecutor's attention after the jury had been selected. Downum objected to any postponement or discharge of the jury and moved that the trial proceed on the remaining four counts. But this was overruled. His motion to dismiss those two counts for lack of prosecution was likewise overruled.

impaneled and sworn, and there was not sufficient cause for its discharge.[3]

The Government takes the position that the action of the trial Judge was well within his judicial discretion in the interest of public justice. Further, the impaneling of the first jury did not actually commence the trial in any real sense—at least not to such an extent as to place the defendant in jeopardy. The Government advances other reasons. The defendant was not put to additional expense, or embarrassment. He was not kept in a continued and prolonged state of anxiety. Nor has he shown himself to have been prejudiced in any way, especially since he has not even claimed that the first jury was any more, or less, favorable than the second jury.

The problem may be illumined, but it is not answered by extremes. Clearly if the jury had not been impaneled, there could be no question of former jeopardy. Just as clearly, if substantial vital evidence had been presented to the first jury, there could have been no second trial in the absence of strong and compelling circumstances. Here, the case is somewhere in between: there was a jury impaneled, but there was no evidence offered or heard.

The guiding principles were announced almost a cen-
235 tury and a half ago in *United States* v. *Perez*, 1824, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165. There the jury was unable to agree and the Court discharged the jury and declared a mistrial. In response to certified questions, the Court held that a Judge may discharge a jury within sound discretion without operating as an acquittal when the ends of public justice require it.

A rigid, inflexible rule of law would not work in situations of this kind. All circumstances must be weighed on the delicate scales of justice. Courts are obliged to see that the scales do not become loaded on either side. On the one side, individuals must be protected from oppressive and fundamentally unfair governmental actions. On the other side, is the mani-

[3] Downum's brief phrases it this way:

"The Trial Court erred in trying defendant before a second jury two days after a prior jury had been selected, sworn in and then discharged because the prosecutor announced not ready, and thereby defendant had been placed in jeopardy once the first jury was sworn in. The absence of a witness as to 2 counts of a 6-count indictment was not an 'unforeseeable circumstance' causing the discharge of the first jury."

fest public interest in the protection of society by effectuating the policies of the penal laws.

Achieving this balance, it is our conclusion that, whatever may be the reaches or impact of this Amendment in other situations shading off of the precise one here, the fundamental purpose of this guarantee is not lost or diminished here by permitting a trial before a new jury after discharge of the first one. The circumstances do not here tip the scales in favor of the accused. Downum was never formally arraigned in the presence of the first jury. No evidence was presented for or against him.[4] Downum was never put to his defense.
236 What, and all there had been, was the impaneling of the first jury and its discharge for reasons entirely unrelated to the jury or the composition of it.

Of course, there has to be some sound reason for the termination of the current trial proceedings which will invariably result in the discharge of one jury with the expectation that another one will be chosen at the subsequent proceeding. *Gori* v. *United States*, 1961, — U.S. —, 81 S. Ct. —, 6 L. Ed. 2d 901. What actually occurred will therefore be of great importance.[5] The reason here was real and substantial. A vital witness was not, and would not be, available for the trial. The protection of double jeopardy is tested against the action taken by the Court. Consequently, it is of secondary importance only to inquire into whether the action or inaction of the prosecutor in not earlier subpoenaing the witness was, or was not, justifiable or excusable. Of course, conduct of the prosecutor may be of great importance where circumstances indicate that events of this kind are being advanced and exploited as pretexts to

[4] *United States* v. *Kraut*, S.D.N.Y., 1932, 2 F. Supp. 16, 18–19, implies that introduction of some evidence is required: "It is now well established by a preponderance of judicial opinion, that a defendant in a criminal action is put in jeopardy when he has been arraigned and placed on trial on a valid information or indictment and before a court of competent jurisdiction. Of course, being put on trial involves the impaneling of the jury and the production of some evidence."

[5] Of the constitutional guarantee against double jeopardy, *Murphy* v. *United States*, 7 Cir., 1923, 285 Fed. 801, 817, puts it this way. "Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue."

squeeze out of a trial then going badly for the Government in the hopes that the deficiencies can be overcome in a later trial.

But here there was no such evidence, nor is there any indication that Downum has been deprived of any right of any kind or that he has been prejudiced in any way."

237 This great constitutional bulwark stands against such conduct by the sovereign, State or Federal.[1] But only on rare occasions will the answer be found by looking at the particular stage to which the trial proceedings have transpired as though matters of such fundamental yet profound importance may be measured solely by matching case against case or trial element against trial element. Hence we reject the vigorous insistence that *Cornero* v. *United States*, 9 Cir., 1931, 48 F. 2d 69, compels a reversal. Intrinsically there are likely distinctions. There the subpoena had never been issued, while here there had been no service of the issued subpoena for reasons which the Court thought justifiable. Also, the delay in *Cornero* was two years, while here it was merely two days. But we do not stress these or other possible distinctions for the Supreme Court, just as are we, was "urged to apply the Cornero interpretation of the 'urgent necessity' rule * * *." It was, as are we, "* * * asked to adopt the Cornero rule under which * * * the absence of witnesses can never justify discon-

238 tinuance of a trial." In rejecting these contentions the Court spoke authoritatively for us as well:

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[1] See *Lovato* v. *New Mexico*, 1916, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244. See also *Collins* v. *Loisel*, 1923, 262 U.S. 426, 429, 43 S. Ct. 618, 67 L. Ed. 1062, where it was said, "The Constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. * * * Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground there was not sufficient evidence to hold the accused, was held, in *Bassino* v. *Cadu*, 208 U.S. 386, 391, 28 S. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905, not to constitute jeopardy."

[1] In the context of Fourteenth Amendment due process, see concurring opinion of Mr. Justice Frankfurter in *Brock* v. *North Carolina*, 1953, 344 U.S. 424, 429, 73 S. Ct. 349, 97 L. Ed. 456.

"A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

"Such a rigid formula is inconsistent with the guiding principles of the Perez decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade* v. *Hunter*, 1948, 336 U.S. 684, 691, 69 S. Ct. 834, 93 L. Ed. 974.

This Court, though not dealing with the exact problem here, had earlier stated the matter in terms of just such substantial underlying considerations. "Various interpretations have been put on the word 'jeopardy,' some courts thinking the first jeopardy is complete on the swearing of a jury, or on the submission of evidence. This is no doubt correct if the trial be stopped for insufficient cause. In other cases it is said that the meaning is that when there has been one real trial there shall not be another, but if a verdict is prevented by something serious, a mistrial can be declared and a new trial ordered without the consent of the accused." *Sanford* v. *Robbins*, 5 Cir., 1940, 115 F. 2d 435, 438.

In the light of these principles the District Court did not abuse its sound discretion in discharging the first jury.
239 *United States* v. *Potash*, 2 Cir., 1941, 118 F. 2d 54, cert. denied, 313 U.S. 584, 61 S. Ct. 1163, 85 L. Ed. 1540.

Affirmed.

240 In United States Court of Appeals for the Fifth Circuit

October Term, 1961

No. 19,033

D. C. Docket No. 22115 Criminal

RAYMOND DOWNUM, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before JONES, BROWN and GEWIN, Circuit Judges.

Judgment

March 9, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued: March 9, 1962.

241 [Clerk's certificate omitted in printing.]

242 Supreme Court of the United States

No. 44 Misc, October Term, 1962

RAYMOND DOWNUM, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for unit of certiorari

October 8, 1962

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 489 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 8, 1962

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

U.S. GOVERNMENT PRINTING OFFICE 1962

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 489

RAYMOND DOWNUM, *Petitioner,*

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 489

RAYMOND DOWNUM,

Petitioner

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

Opening Statement

In *Gori* v. *United States*, 367 U.S. 364, decided on June 12, 1961, the five member majority of this court, in passing on the question of double jeopardy, specifically refused to anticipate a hypothetical case "in which a judge exercises his authority to help the prosecution at a trial in which its (the government's) case is going badly by affording it another, more favorable opportunity to convict the accused" (367 U.S. 369). The case there hypothesized is the actual case now presented by this record. In this case after the accused had been arraigned and pleaded not guilty, a jury was empaneled and sworn. At the request of the prosecution and over the protest of the accused through

his appointed counsel, the court discharged the jury because the prosecution had not checked his witnesses before selecting the jury and one prosecution witness was absent. At a later time and over the accused's plea of former jeopardy, there was a second trial before another jury at which time the accused was convicted.

Opinions Below

There was no opinion written by the United States District Court for the Western District of Texas, San Antonio Division, in this case. The opinion of the United States Court of Appeals for the Fifth Circuit can be found in the transcript of record beginning at page 38.

Constitutional Provision Involved

This case involves that provision of the Fifth Amendment to the Constitution of the United States of America which provides that no person shall " . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ".

Questions Presented

The Trial Court's overruling of Petitioner's plea of former jeopardy and its subsequent approval by the Court of Appeals raises the following basic question: Whether, after the United States announces ready in a criminal case and a jury is selected which is sworn in, and the prosecution then discovers it is not ready because of the absence of a witness as to two counts of a multicount indictment who had not been served with subpoena, it can obtain another jury to attempt to convict the accused.

Statement of the Case

Petitioner was indicted with other co-defendants for forgery and passing of government checks and conspiracy to forge and pass government checks. As to Raymond Downum, there were six counts of the indictment which related to him (R. 1-4).

On April 19, 1961, Petitioner was arraigned in open court together with his co-defendants, Juan R. Campos and Ronnie Heck (R. 31-38).

Downum pleaded not guilty to all counts of the indictment against him, while the co-defendants, Juan R. Campos and Ronnie Heck, pleaded guilty to all indictments against them at that time (R. 31-38).

On April 25, 1961, the Trial Court called the case of *United States of America* v. *Raymond Downum* for trial and both the accused and the prosecution announced ready without qualification. Whereupon, a jury was selected and the entire jury was duly sworn to render a true verdict in the case of *United States of America* v. *Raymond Downum*. The trial was then recessed until after lunch. Thereafter at 2:00 p.m., the jury still being in the hall, the court announced from the bench in open court, that the prosecutor had advised him in chambers that the government was not ready because of the absence of a material witness, and the court stated that he was going to discharge the jury. Defendant thereupon objected to any postponement or discharge of the jury. Upon inquiry as to who the missing witness was, the prosecutor announced that it was Clarence D. Rutledge, the named Payee on checks involved in counts Six and Seven in the indictment against the accused. The accused then moved that the trial proceed on the remaining four counts in which the missing witness was

not involved. The court overruled this motion. Thereupon the accused moved to dismiss counts Six and Seven for want of prosecution which motion was likewise overruled (R. 9-10).

The court then called the jury into the courtroom and discharged them from the case (R. 11).

The prosecutor stated that the reason that he had announced ready when actually he was not ready was that neither he nor any member of the U. S. Attorney's Staff had checked with the United States Marshal's office to ascertain whether or not all of the subpoenas in this case had been served, even though he admitted that the United States Marshal's office was directly across the hall from his office (R. 16-23).

Thereafter on April 27, 1961, the case was again called for trial and another jury from another panel, different from the first panel was selected. Prior to selecting this jury, the accused pleaded former jeopardy under the Fifth Amendment and asked the court to dismiss the charges against him (R. 11-12).

The court overruled this plea, the jury was selected, and after a trial, Petitioner was convicted on all six counts of the indictment (R. 25).

After conviction and sentence, the accused filed a motion for a new trial and again urged his plea of former jeopardy which the court overruled (R. 30). On appeal to the United States Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 44), and this Court has granted certiorari.

ARGUMENT AND AUTHORITIES

When the First Jury Selected and Sworn to Try Petitioner Was Discharged for the Sole Benefit of the Government for a Cause Which Was Not an "Unforeseeable Imperious Necessity" Petitioner Was Placed in Jeopardy and a Subsequent Trial by Another Jury Was Therefore Void.

In its opinion in this case, the Court of Appeals has amended the Fifth Amendment of the Constitution of the United States so that it no longer says that no person shall " . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ". It has changed the wording to read that no person shall be put in jeopardy a second time "except if the 'ends of public justice will be defeated' (whatever that means) as determined by the Trial Court in his discretion" (R. 40).

The Government has virtually conceded Petitioner was put in jeopardy in its reply to Petitioner's application for certiorari, but asserts that it was "jeopardy in the most technical sense of the term" (page 5, Government's Brief). However, Petitioner's position is that the Constitution does not make any distinction between jeopardy and "technical jeopardy".

If this Court affirms the conviction of Petitioner, the principle will be established that the prosecution will have a free look at the jury with the only "unforeseeable imperious necessity" required being that the Government did not check its witnesses and a witness to a few counts of a multi-count indictment is not present. By this means the Government could obtain a new jury for the entire indictment if dissatisfied with the original jury.

In *Gori*, Mr. Justice Douglas said:

> "Once a jury has been empaneled and sworn, jeopardy attaches and subsequent prosecution is barred if a

> mistrial is ordered—absent a showing of imperious necessity * * *. The prosecution must stand or fall on its performance at the trial. *I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because a prosecutor misuses his office and is guilty of misconduct.*" (Emphasis added.)

It is true that the above question comes from the four member dissenting minority, but the majority in *Gori* does not question the soundness of the principles announced by Justice Douglas. The majority there went off on the grounds that the order of mistrial there was "the product of the trial judges extreme solicitude—an over-eager solicitude, it may be—in favor of the accused" and inferentially the "over-eager solicitude" of the trial judge *in favor of the accused* constituted our "imperious necessity". How different the controlling facts in *Gori* were from the facts at bar!

Justice Douglas obviously assumed that the entire court would agree that "a mistrial directed because the prosecutor has no witnesses" would make valid a plea of double jeopardy and yet this is exactly what happened in this case.

This rule of course was derived from the case of *Cornero* v. *United States*, 9 Cir. 1931, 48 F. 2d 69, a case virtually identical in fact to the one involved here, in which it was held jeopardy attached.

In that case, the defendants were charged in a one-count indictment with a conspiracy to possess and transport intoxicating liquors with four others. Three of the others pleaded guilty and defendant pleaded not guilty on July 12, 1927. On May 3, 1928, a jury was empaneled to try the defendant without the District Attorney having ascertained whether or not his witnesses were present. He was

relying on the testimony of two of the co-defendants who had previously pleaded guilty and who were released under bond to appear for sentence on the day of trial. They had not been subpoenaed as witnesses but it was assumed by the District Attorney that they would be present at the trial in view of the obligation under bond to do so. After the jury was empaneled, the District Attorney found that the witnesses were not present and the court continued the case from time to time until May 8, 1928, at which time the witnesses still had not been found and the court discharged the jury.

Two years later, on May 6, 1930, a second jury was selected, appellant's plea of former jeopardy was overruled and Cornero was convicted and sentenced to two years and a fine of $7500.00. The Ninth Circuit held that the defendant's plea of former jeopardy should have been sustained; the judgment was reversed with instructions to the Trial Court to discharge the defendant. The Court said:

> "The fact is that, when the district attorney empaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. *There is no difference in principle between a discovery by the district attorney immediately after the jury was empaneled that his evidence was insufficient and a*

discovery after he had called some or all of his witnesses. It is uniformly held that, in the absence of sufficient evidence to convict, the district attorney cannot by any act of his deprive the defendant of the benefit of the constitutional provision prohibiting a person from being twice put in jeopardy for the same offense." (Emphasis added.)

The Court of Appeals in this case attempted to distinguish the *Cornero* case on the thin thread that in that case no subpoena had been issued for the witnesses, while in this case, the subpoena had been issued but not served "for reasons which the court thought justifiable". The Court of Appeals completely missed the point in regard to this. The complaint is not because a subpoena had not been served, but because the prosecutor and his staff did not make a simple cursory check, before selecting the jury, to find out whether all of the subpoenas had been served. As it says in *Cornero*, when the district attorney empaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.

If the reason why the subpoena had not been served was valid, the prosecution, had he checked, could have called the court's attention to this fact before selecting the jury and a continuance could have been obtained.

Even though the prosecutor found out after the jury was selected that his witness was not present, he could have asked for a short continuance of a few days and when the witness was found two days later, could have tried Petitioner using the first jury selected. But the prosecutor asked for a mistrial and a second jury to try Petitioner and the court granted the prosecutor's request in spite of Petitioner's protest.

A second reason which the Court of Appeals gave in trying to distinguish *Cornero* was that the delay in *Cornero* was two years and here it was merely two days. This points up even more realistically the danger that is present if the principle announced by the opinion of the Court of Appeals is established. The prosecution could have a witness upon whom a subpoena was not served but who was available for subpoena. The prosecution could then announce ready and proceed to select a jury, but if the jury looked to the prosecution to be favorable to the accused, the prosecution could then ask for a mistrial on the grounds of a missing witness. They could then come in just a short time after and obtain another jury more likely to convict.

The Government in its reply to the petition for certiorari attempted to distinguish on the basis that the second trial two years later was properly found to be harassment of the defendant, and that since there was only two days delay in this case, the defendant was not harassed. Harassment is not the test of jeopardy and the Government made no other attempt to distinguish the *Cornero* case; it simply dismissed it by referring to *Wade* v. *Hunter*, 336 U.S. 684, saying that the *Cornero* case cannot apply a rigid rule. We agree that *Cornero* cannot be used as a rigid rule, but the circumstances in this case were virtually identical with *Cornero* and nowhere near the circumstances of *Wade* v. *Hunter*, where the movements of the Army in the field compelled the discontinuance of trial, something that was an unforeseeable event.

Two other older Federal cases, although not cited in *Cornero*, supported its decision and held that once a jury is empaneled and sworn, jeopardy attaches.

The first is *United States* v. *Shoemaker*, 27 Fed. Cases 1067 (No. 16279). In this case the jury was empaneled and witnesses were sworn and then the prosecutor abandoned

the prosecution and entered a *nolle prosequi* on the indictment. The court in holding that this placed the defendant in jeopardy said,

> "However guilty he may be, he can be convicted only according to law. And a jury having been sworn to try his case he has a right to their verdict unless some inevitable occurrence shall interpose and prevent the rendition of a verdict. Before he goes to trial, the prosecutor should see that his witnesses are in attendance and that he is prepared to try any issue."

The Court cited from *Com.* v. *Cook*, 6 Serg. & R. 577 where the court decided that the discharge of a jury once sworn in a criminal case was an acquittal of the defendant.

The second case is *United States* v. *Watson*, 28 Fed. Cases 499 (No. 16651) where the court held that a discharge of a jury because of the illness of the district attorney and the absences of witnesses for the United States placed the defendant in jeopardy. The court said,

> "The mere illness of the district attorney, or the mere absence of witnesses for the prosecution under the circumstances disclosed by the record in this case is not ground upon which in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial thus commenced."

The Court of Appeals based its opinion almost entirely on the case of *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, and stated that *Perez* holds that a judge may discharge a jury within sound discretion without operating as an acquittal when the ends of public justice require it.

Petitioner says that this is a misstatement of the principle announced in *Perez*. *Perez* stated in all cases of *that nature* (a hung jury) jeopardy did not attach when there was a manifest necessity for the mistrial or the ends of public justice would be defeated, but *Perez* did not hold that jeopardy does not apply in cases which are *not of that nature* where the ends of public justice would be defeated. Possibly, many times the ends of public justice may require that an individual be tried three or four times until he is convicted, but the constitutional guarantee against being twice placed in jeopardy prohibits this.

The Court of Appeals says there must be a sound reason for the mistrial if it is not to result in jeopardy and points out the "real and substantial" reason here was that a vital (Government) witness would not be available for the trial.

Yet in the same paragraph of the Opinion, the Court contradicts itself and says, "Of course, conduct of the prosecutor may be of great importance where circumstances indicate that events of this kind are being advanced and exploited as pretext to squeeze out of a trial then going badly for the Government in the hopes that the deficiencies can be overcome in a later trial".

Was not the mistrial requested by the prosecutor and granted by the court so the Government could get out of a trial for which they were not ready for in the hopes that the deficiency could be overcome in a later trial?

The Court of Appeals naively says that there was no evidence or indication that Petitioner was deprived of any right or prejudiced in any way because of the action of the Court in discharging the first jury, citing *Lovato* v. *New Mexico*, 242 U.S. 199, where a simple irregularity occurred and after a jury was sworn, defendant was arraigned and pleaded not guilty, and the identical jury was again em-

paneled. They also cite *Collins* v. *Loisel*, 262 U.S. 426, where it was held that an extradition hearing was not a trial calling for the attachment of jeopardy. The Court also quotes from that case which quotes from *Bassing* v. *Cady*, 208 U.S. 386, where it was held that arraignment and pleading without the selection of a jury was not jeopardy.

These cases give no indication and are certainly not authority for the contention that Petitioner's right given to him by the Constitution that he shall not be placed in jeopardy more than one time was not violated in this case.

The Court of Appeals opined "The circumstances do not here tip the scales in favor of the accused". Apparently this is in response to the Government's contention that Petitioner has never claimed that the first jury was any more, or less, favorable than the second jury. This is something the Petitioner could not prove if he had to, and if an accused, who was subjected to a second trial after a mistrial was declared in his first trial, had to prove that the first jury was more favorable than the second jury, then jeopardy would become a dead letter in the law. The scales definitely were tipped against the accused and the prosecutor was given a second more favorable opportunity before another jury to attempt to convict the accused. The Court of Appeals indicates by citing a New York District Court case in footnote 4 that the defendant is not placed in jeopardy until some evidence is put on. However, Mr. Justice Douglas in *Gori* says unequivocally, "Once a jury has been empaneled and sworn, jeopardy attaches and a subsequent prosecution is barred if a mistrial is ordered—absent a showing of imperious necessity".

The Court quotes from *Sanford* v. *Robbins*, 5 Cir., 1940, 115 F. 2d 435, 438, a case similar to *Gori* where a new trial was given by the President of the United States in the sole

interest of the accused. They cite the court's language which says, "Various interpretations have been put on the word jeopardy, some courts thinking that jeopardy is complete on the swearing of a jury or on the submission of evidence. *This is no doubt correct if the trial be stopped for insufficient cause*".

What is insufficient cause? If this case is not an example of insufficient cause, then there is no such thing in the law.

The Government cited other cases in its reply to the petition for certiorari where jeopardy did not attach when a mistrial was declared. However, in three of them the mistrial was for the protection of the defendant and not for the benefit of the Government (*Simmons* v. *United States*, 142 U.S. 148; *Scott* v. *United States*, 202 Fed. 2d 354, certiorari denied 344 U.S. 879; *United States* v. *Giles*, 19 F. Supp. 1009 [W.D. Okla.]), and in two of them the mistrial was declared because of a hung jury (*Dreyer* v. *Illinois*, 27 U.S. 71; *Logan* v. *United States*, 144 U.S. 263). In *Brock* v. *North Carolina*, 344 U.S. 424, a discharge of a jury occurred because certain prosecution witnesses took the Fifth Amendment and a mistrial was declared. A seven to two decision upheld the second trial but based it on the fact that the Fourteenth Amendment and not the Fifth Amendment was involved, and Mr. Justice Frankfurter in his concurring opinion clearly indicated that if the Fifth Amendment had applied, the case would have been reversed.

All of the cases where jeopardy has not attached, which this court discussed in *Gori*, turned on an affirmative finding on the question as whether there was a "imperious necessity", "unforeseen circumstances", or the mistrial had been granted in the sole interest of the defendant as in *Gori*. The decision of the Court of Appeals herein is the only case in the books where, for no other cause than for

the sole benefit of the prosecutor, one jury has been empaneled and then discharged and the defendant has then been tried by a second jury.

There was nothing in this case that could not have been foreseen had the prosecutor used the slightest diligence. The question was not, as the Court of Appeals terms it, as to whether the prosecutor should have or should not have subpoenaed the witness earlier and whether or not his failure to do so was justifiable or excusable. *The question is as to whether the prosecutor should have checked to see whether the subpoena was served before he announced ready and picked the jury.* The Court, when he found out the witness was not going to be present, could have postponed the trial as was done in *Cornero* but instead, at the request of the prosecutor and on the protest of the defendant, the Court discharged the jury.

The Court of Appeals closed its opinion stating "in the light of these principles, the District Court did not abuse its sound discretion in discharging the first jury", citing *United States* v. *Potash*, 118 F. 2d 54, by the Second Circuit, where a mistrial was declared after the jury had begun deliberating and one of the jurors became incapacitated and did not return to finish deliberation. That has absolutely no relation to this case because that was clearly an unforeseen circumstance, which neither side could have anticipated just as a hung jury was an unforeseen circumstance in the case of *United States* v. *Perez*, *supra*, and just as was the tactical situation of the Army in the field in *Wade* v. *Hunter*, 336 U.S. 684.

Conclusion

The opinion of the Court of Appeals in this case decides the hypothetical situation posed in this court's opinion in *Gori* v. *United States* in a manner indicating a complete disregard of the court's language and is directly contrary to the opinion of the Ninth Circuit in *Cornero* v. *United States*. To fail to reverse this case will simply be a license to all Government prosecutors in important cases to have certain witnesses, or one witness, not served with subpoena and then, if the jury is unsatisfactory, to simply ask for another jury. It places within the Trial Court's "discretion" the constitutional prohibition "against being twice put in jeopardy", *United States* v. *Ball*, 163 U.S. 662. The Fifth Amendment was designed to protect defendants against this type of situation and this Court should reverse and render this case, and direct that the Petitioner be discharged.

November 20, 1962.

Respectfully submitted,

RICHARD TINSMAN
Attorney for Petitioner

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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 489

RAYMOND DOWNUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 38–43) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1962 (R. 44). The petition for a writ of certiorari was filed on April 6, 1962, and was granted on October 8, 1962 (R. 45; 371 U.S. 811). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was subjected to double jeopardy, in violation of the Fifth Amendment, by his

trial before a second jury two days after the court discharged the first jury because of the absence of a key government witness (for whom a subpoena had been issued but not served), where the discharge was ordered after the first jury had been sworn but before any other step had been taken.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment provides as follows:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *

STATEMENT

Petitioner and three codefendants were indicted on April 17, 1961, in the United States District Court for the Western District of Texas on charges of stealing from the United States mail, forging endorsements on government checks thus stolen, uttering the checks, and conspiracy (R. 1–4).[1] Following

[1] The various counts charged:

Count 1, that defendants Juan R. Campos, Ronnie Heck and Raymond Heck stole from a house letter box a letter addressed to Dolores M. Cameron.

Count 2, that Ronnie Heck forged the name of Dolores M. Cameron, payee of a government check in the amount of $56.30, contained in said letter.

Count 3, that said defendants and petitioner uttered said check as true, knowing that the endorsement was forged.

Count 4, that petitioner forged the name of Jayne M. Maltsberger, payee of a government check in the amount of $58.00.

Count 5, that all four defendants uttered said check as true, knowing that the endorsement was forged.

Count 6, that petitioner forged the name of Clarence D.

pleas of guilty by other defendants, petitioner was tried alone before a jury and convicted on counts 3 to 8, inclusive, the only counts applicable to him (R. 35–37, 25). He was sentenced to imprisonment for eight years on counts 3 to 7, inclusive, and concurrently therewith to five years imprisonment on the conspiracy charge (R. 24). The court of appeals affirmed (R. 38–44). The relevant proceedings may be summarized as follows:

On April 19, 1961, petitioner was arraigned in open court and pleaded not guilty (R. 31–38). On the morning of Tuesday, April 25, 1961, the case was called for trial and both sides announced ready. A jury was then selected and sworn and instructed to return to the courtroom at 2:00 p.m. (R. 9). At the opening of the afternoon session before the jury was assembled in the box the following colloquy took place (R. 10–11):

> The COURT. Mr. Tinsman, in your case the Government's key witness is not here. They announced ready and didn't have the witness when they announced. So I am going to discharge this jury from the case, and pass it.
>
> Mr. TINSMAN [defense counsel]. Is it permissible to tell me who the Government's key witness is that's missing?

Rutledge, payee of a government check in the amount of $19.00.

Count 7, that petitioner uttered said check as true, knowing that the endorsement was forged.

Count 8, that the defendants conspired to commit the foregoing offenses.

Mr. McDONALD [Assistant United States Attorney]. Mr. Rutledge, one of the named payees in the indictment. It is Counts 6 and 7 of the indictment.

Mr. TINSMAN. Well, are you unable to find him?

Mr. McDONALD. We have been unable to have the subpoena served at the present time.

Mr. TINSMAN. Your Honor, I feel this way. In view of the fact this is only as to two counts of the indictment, and there are still, as to Raymond Downum, four other counts, and in view of the fact the Government announced ready and we picked the jury, that we should go forward at this time on the counts that I assume they are ready on—the other counts.

The COURT. Do you want to have two trials?

Mr. TINSMAN. At this time, Your Honor, I think I am in the position that I would just as soon have two trials. I picked a jury and I think it's a satisfactory jury.

The COURT. I am not willing to have two trials. It will take too much time of the Court. The Government shouldn't have picked a jury when they weren't ready. Unfortunately, they didn't check up on the witnesses.

Mr. TINSMAN. Let me make a motion at this time to dismiss Counts 6 and 7 for want of prosecution.

The COURT. Those are the two counts?

Mr. TINSMAN. Yes, sir.

The COURT. I will overrule the motion because they expect to give you a trial later this week or next week.

Mr. TINSMAN. All right, sir.

The COURT. So when the jury comes in I will just discharge them from this case and may use them in another case. Is your defendant on bond?

Mr. TINSMAN. No. The defendant is in the county jail.

The COURT. Take charge of him, Mr. Marshal.

Two days later—on the afternoon of Thursday, April 27—the case was called and petitioner's counsel pleaded former jeopardy (R. 5–9, 11–12). On the following morning, Friday, April 28, petitioner announced ready for trial, subject to his motion. After petitioner had been tried and found guilty as charged (R. 12–16), his counsel developed the facts on the plea of former jeopardy in a colloquy with the Assistant United States Attorney. The latter stated that on the Wednesday or Thursday of the preceding week, twelve cases were set for call on the following Monday. Approximately one hundred witnesses had to be called. Subpoenas for all the witnesses, including Mr. Rutledge, were prepared and delivered to the marshal for service. On Monday, the day before this case came up, the Assistant United States Attorney checked with the marshal and received the information that the witness' wife was going to let him know where her husband was, if she could find out (R. 16–17). He was unable to check immediately at the time the case was called (Tuesday) as he was in another case the morning of that day (R. 16–18). There were three attorneys on duty at that time, a fourth being on leave for military service. All of the available attorneys were

"swamped," due to the fact that twelves cases were set. Petitioner's case was number ten on the list and the Assistant United States Attorney had not foreseen that it would come up for trial on the second day of the week (R. 18–21).

The court stated that it knew as a fact that these cases were set "on very short notice" and that every one of the attorneys "was head over heels in work" (R. 18). The plea of double jeopardy, which was also renewed at the time of sentencing, was overruled (R. 22–26).

The court of appeals affirmed the district court's rejection of the plea, stating (R. 41):

> * * * whatever may be the reaches or impact of this Amendment in other situations shading off of the precise one here, the fundamental purpose of this guarantee is not lost or diminished here by permitting a trial before a new jury after discharge of the first one. The circumstances do not here tip the scales in favor of the accused. Downum was never formally arraigned in the presence of the first jury. No evidence was presented for or against him. Downum was never put to his defense. What, and all there had been, was the impaneling of the first jury and its discharge for reasons entirely unrelated to the jury or the composition of it.

SUMMARY OF ARGUMENT

I

Consideration of the common law history and development of double jeopardy concepts establishes that where there has been no adjudication on the merits, a trial before a second jury is barred only

when, under the particular circumstances, it represents oppressive practice on the part of the government.

The American concept of double jeopardy is an amalgam of two distinct and ancient ideas: (1) the old common law plea of *autrefois acquit* or *convict*, a plea which lay only where there had been a final verdict of innocence or guilt, and (2) the rule that a jury, once empanelled, could never be discharged before delivering a verdict. The latter theory, rejected as an absolute bar to retrial in 1824 in *United States* v. *Perez*, 9 Wheat. 579, has developed into the flexible limitation that when the jury is discharged before a verdict, the right to a retrial depends upon its essential fairness to the defendant and to the government as the representative of the public.

Contrary to petitioner's contention, the double jeopardy clause does not impose a fixed rule that once a defendant has been placed in jeopardy, he cannot be brought before a second jury. This is demonstrated not only by history but also by the fact that this Court has upheld the right of retrial in every case in which the discharge of the jury before verdict has been questioned. In each such case the defendant was twice in jeopardy but in each there was no unfairness or harassment. There having been no unfairness here—petitioner can show no prejudice, injustice or oppression—his trial before a second jury was proper.

II

In this case petitioner had not been put in jeopardy in any realistic sense. A jury had been sworn after the case was announced ready. Nothing more was

done. Before the jury had even assembled in the box for the opening of trial, it was discovered that an important witness, known to be available and for whom a subpoena had actually been issued, had not in fact been served. The court thereupon discharged the jury and advised petitioner that he would be tried later in the week. Two days later he was tried before a new jury.

Petitioner can show no prejudice from the procedure here followed. This is not a case where the government proceeded to trial without knowing whether or not it had the evidence to prove its case. Here, the witness was known to be available within a day or two; the prosecution had merely failed to discover that the subpoena, although issued, had not been served—an oversight which the judge, who was familiar with the circumstances, found to be excusable. Admittedly, a two-day continuance would have been proper; but if it were not an appellate reversal of a conviction after such continuance would not bar a subsequent trial. The double jeopardy clause does not entitle the petitioner to a judgment of acquittal because, instead of the case being continued, a jury which had not begun to hear the case was discharged and another jury chosen two days later.

The government recognizes that the prosecution is not entitled to a mistrial because its case is going badly or because it does not have the evidence to prove its case. For this reason the courts properly view with strictness a discharge of the jury because of the absence of witnesses. But to discharge a jury

for that reason does not automatically bar a second trial without regard to whether such second trial would be fair to the defendant and in the interest of the administration of justice. *Wade* v. *Hunter,* 336 U.S. 684. The circumstances here show that fairness and public justice justified the trial court in rejecting the plea of double jeopardy and permitting a trial of the merits of the grand jury's indictment.

ARGUMENT

In this case, the "first trial" upon which petitioner rests his claim of double jeopardy consists of the swearing of a jury. Beyond that nothing was done, not even the assembling of the jury in the box to hear the case. Before even that could occur, the prosecutor had discovered and informed the court that through oversight (understandable under the circumstances, as we discuss below) the subpoena to a material witness had not been served. Admittedly, if the court then had continued the case for two days, there could have been no claim of double jeopardy. Nor, we submit, considering the circumstances disclosed in this record, could a two-day continuance on request of the government have been deemed an abuse of discretion. However, instead of holding the jury together for two days of wasteful inaction, or adopting the alternatives suggested by petitioner of severing the trial in two or dismissing the counts in which the witness was involved, the judge decided to discharge the jury, which had not yet begun to act as such in the trial of the case; and he set the case for trial two days later.

The question which this case presents is whether the trial judge's decision to discharge the jury so violated the rights of petitioner that he must be given the equivalent of a judgment of acquittal with the right never to be tried for the offense charged. It is the government's position that neither the double jeopardy clause of the Constitution, nor the decisions interpreting it, nor any considerations of due process require a result so contrary to the interests of public justice. It is clear that had the court granted a continuance and been reversed on appeal, petitioner could have been retried before a new jury. It would indeed be anomalous if the law which will require the defendant to undergo two such full trials were held to grant him immunity from one because a jury which had not begun to hear the case has been discharged.

It is not the law that once a jury has been impanelled in a criminal case, its discharge before any evidence has been submitted automatically bars the government from trying the defendant before another jury. On the contrary, both the history of the double jeopardy provision and the settled course of judicial decision establish that the determination whether the discharge of a jury bars a subsequent prosecution depends not upon technical rules, but upon whether, in the circumstances of the particular case, such prosecution would result in any basic unfairness to the defendant. In this case, the trial and conviction of the petitioner, two days after the discharge of the first jury, to which no evidence had been submitted, plainly did not prejudice petitioner or deny him any consti-

tutional rights. In these circumstances, his second trial did not constitute double jeopardy.

I

THE RIGHT TO RETRY A DEFENDANT AFTER A JURY HAS BEEN DISCHARGED WITHOUT REACHING A JUDGMENT ON THE MERITS DEPENDS ON CONSIDERATIONS OF ESSENTIAL FAIRNESS TO THE DEFENDANT AND THE GOVERNMENT

The present American concept of double jeopardy represent an amalgam of two ideas having a different origin and history. The main source of the double jeopardy clause, and its primary content, was the common law pleas of *autrefois acquit* or *autrefois convict*. Blackstone pointed out that (4 Blackstone, *Commentaries*, 335–336):

> * * * [T]he plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence * * *.[2]

Those pleas, however, did not lie unless a verdict of either innocence or guilt was delivered by the trier of fact. 2 Wharton, *Criminal Procedure* (10th ed.), Sec. 1426; 2 Hale, *Pleas of the Crown* (1847), 241–242; 2 Hawkins, *Pleas of the Crown*, 527 (6th ed. 1787). See *Regina* v. *Winsor*, 10 Cox C.C. 276, 327, 329 (Q.B.

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[2] A passage from Bracton shows an awareness of such a doctrine. He notes that an appellee who vanquishes the appellant in battle is absolved from further suits, even from "the suit of the king, because by this he purges his innocence against them all, as if he had put himself upon the country, and the country had altogether acquitted him." II Bracton, *Laws and Customs of England*, c. 19, § 8. See also 2 Hawkins, *Pleas of the Crown*, 527 (6th ed. 1787).

1865, Ex. Ch. 1866); *Regina* v. *Charlesworth*, 5 L.T. 150, 151 (Q.B. 1861).

The second element—the power to declare a mistrial—has a very different background. It begins with the ancient notion that the jury, once empanelled, is irrevocably vested with the exclusive power—and, no less important, the unshakable duty—finally to dispose of the cause. The mystical notion that a jury, once assembled, must sit to the end continued to have force long after the ideas which gave rise to it had disappeared, probably because it represented a bar to the abuse of power by the Crown's prosecutor. Undoubtedly because it represented a weapon against abuse, this limitation upon the court's power to discharge the jury developed in the United States not only in terms of power, as it had in England, but of fairness as well. In time, the limitation became a gloss upon the double jeopardy clause. However, the extent of the limitation, as reflected in the decisions in this field, has remained confused due to its historic development from a concept of power to one of a mixture of power and fairness. It is our position, fortified we believe by all the decisions of this Court in this field, that where a jury is discharged for any reason before verdict, retrial may be had without violating the double jeopardy clause, except where the declaration of mistrial is the result of an abuse of power by the prosecution.

A. THE ENGLISH BACKGROUND AS TO THE POWER OF JUDGES TO DISCHARGE JURIES BEFORE VERDICT

The theoretical concept of the duty of a jury at common law was thus summarized by Lord Coke (3 Inst. 110):

> To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged * * *.

Not only could the jury not be discharged at the request either of the Crown or of the prisoner, or of both, but the possibility of jurors failing to agree was forestalled, by not releasing them until they *did agree* (2 Coke upon Littleton, Book 3, c. 5, Sec. 366):

> By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. * * *

The verdict, once entered, was in turn final and conclusive; neither a writ of error nor a new trial could be had even by the defendant.[3]

These attributes of the jury system at early common law can be explained only as reflecting an almost mystical concept of the jury as an organ of truth

[3] See opinion of Mr. Justice Story, on circuit, in *United States* v. *Gibert*, 2 Sumner 19, 25 Fed. Cas. 1287, 1294–1303 (No. 15,204) (D. Mass. 1834); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 4.

endowed, perhaps divinely, with the final authority to adjudge the case—a concept which, however foreign to modern ears, no doubt seemed less strange to a society that had but recently found truth revealed by physical combat or by ordeal. Whatever the genesis of the rule, however, it seems evident that its concern was not, as such, the protection of the prisoner in the individual case, for the coercion of the jury to reach a verdict and the denial of any remedy for error, either by mistrial or by appeal, seem harsh indeed by today's standards. Rather, the rule was essentially a "jurisdictional" one, concerned simply with the division of power between the jury and the judges. The authority to decide the case was in the jury, and the judges had no more power to discharge the jury before verdict than they did to reverse its decision or order a new trial after verdict.

It also appears that the idea of keeping one jury together to reach a verdict was kept alive after its mystical origin had lost force because it was a theoretical weapon against abuse of royal power by the prosecution. There seems no doubt, however, that in actual practice juries were on occasion discharged before verdict, starting with the situations where events, such as the death or illness of a juror, made it impossible for a verdict to be reached.[4] In addition, Hale in his *Pleas of the Crown*, Vol. 2, p. 295, reports that it was common practice to discharge the jury and order a retrial if it appeared that

[4] See opinion of Cockburn, C. J., in *Regina* v. *Winsor*, 10 Cox C.C. 276, 310 (Q.B. 1865, Ex. Ch. 1866).

some of the evidence was not then available. And at the time of the Stuarts, indeed, the practice became subject to considerable abuse. An example of the vexatious practices of the day is *Whitebread and Fenwick's Case*, 7 State Trials 311, 315, where the Crown, seeing that its evidence was insufficient, moved for a mistrial in order to gather more evidence. Upon obtaining the evidence, the defendants were retried.

After the Revolution of 1688, the pendulum swung back and there seems to have been some agreement among the judges severely limiting the practice of discharging jurors before verdict.[5] Once again, however, it was found impossible to adhere to a rigid rule. In the case of the two *Kinlochs*, Foster, *Crown Cases* 16 (1746), the question arose whether, on a trial for treason, a capital offense, the court had power, at the defendant's request, to discharge a jury so that the defendant could put in a defense that would otherwise have been unavailable to him. The issue was raised by a motion in arrest of judgment after the defendant had been retried and convicted. Foster reports that all ten judges, except one, agreed that the conviction at the second trial should be upheld and that they agreed "that admitting the rule laid down by Lord Coke to be a good general rule, yet

[5] The agreement was reported as being that there would be no withdrawal of a jury without consent in felony cases and none, even with consent, in capital cases, but the accuracy of this report was questioned by Foster in his summary of the case of the two *Kinlochs*, discussed in the text. See Foster, *Crown Cases*, pp 27–28.

it cannot be universally binding: nor is it easy to lay down any rule that will be so" (*id.* at 27). All of them agreed, however, in condemning the practice of discharging a jury to permit the Crown to obtain further evidence as had been done in the case of *Whitebread and Fenwick* under the Stuarts.

This decision emphasizes that the English development of the power to discharge juries was in terms, not of a privilege personal to the defendant, but of jurisdictional concepts of the powers vested in juries, which might operate equally in favor of or against the defendant. That was reflected, indeed, in the procedural mode by which the question was raised. Unlike the pleas *autrefois acquit* or *autrefois convict*, which were in the nature of pleas in bar, the objection that a jury had been previously sworn and discharged was raised by a motion in arrest of judgment which challenged the *jurisdiction* of the second tribunal.[6] It was because the matter was so viewed—rather than as being a privilege of the defendant that he might raise to bar the second trial—that the issue was considered so doubtful in the *Kinlochs* case notwithstanding that the discharge of the original jury had been at the defendant's request and for his benefit. While the defendant could have waived his "privilege," if such it had been, to be tried by the original jury, he could not confer upon a second jury a power that the law had given exclusively to the first.

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[6] See, *e.g.*, *Regina* v. *Charlesworth*, *supra*; *Regina* v. *Winsor*, *supra*. The issue was raised by a plea in bar before the second trial in *Conway and Lynch* v. *Regina*, 7 Irish Law Rep. 149, and the Crown did not object. The judges decided the issue, but expressed doubts as to whether the procedure was correct.

The consequence of viewing the problem essentially as one of the impotence of the judge to take from the original jury its power of decision and give it to another jury was that, once that conceptual difficulty was overcome, there remained nothing to prevent a second trial whatever the reason for the discharge of the first jury may have been. In the middle of the nineteenth century, the English courts definitively upheld the power of a judge to discharge a jury which could not reach agreement.[7] By this time there was no fear in England of abuse of royal authority and the concept of separation of powers between executive and judiciary had less significance for the British than for Americans. Accordingly, once the English courts held that the power given the first jury was not irrevocable, it followed that there was no bar to a second trial whether or not the power to discharge the first jury had been erroneously or improperly exercised, and the courts so held. See opinion of Erle, C. J., for the Exchequer Chamber in *Regina* v. *Winsor; supra,* 10 Cox C.C. at 329; *Rex* v. *Lewis,* 78 L.J. K.B. (N.S.) 722 (1909); *Regina* v. *Davison,* 2 F. and F. 250, 254 (1860). Indeed, in *Rex* v. *Lewis,* the Court of Criminal Appeal expressly disapproved of the ground for which a mistrial had been declared (because prosecution witnesses were absent) but nevertheless upheld the retrial and ultimate conviction of the defendant.

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[7] *Regina* v. *Charlesworth,* 5 L.T. 150 (Q.B. 1861); *Regina* v. *Winsor,* 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).

A contrary ruling was reached in *Conway and Lynch* v. *Regina,* 7 Irish Law Rep. 149, but the dissenting opinion of Justice Crampton in that case was adopted in the cases cited above.

B. IN THE UNITED STATES THE QUESTION OF THE POWER TO DISCHARGE A JURY BECAME INTERMINGLED WITH ISSUES OF FAIRNESS AS A GLOSS ON THE DOUBLE JEOPARDY CLAUSE

1. At the time of its adoption the double jeopardy clause of the Constitution was not concerned with the problem of the power to discharge a jury before verdict

a. There is considerable reason to believe that the double jeopardy clause of the Constitution was not concerned at all with the then unsettled question of English law as to the power of a judge to discharge a jury before verdict. The purpose of the Bill of Rights was to codify the already well established principles of liberty. In introducing a draft of proposed amendments to the Constitution, on June 8, 1789, Representative Madison, after mentioning various objections which had been made against the original document, said (1 *Annals of Congress* 433):

> [B]ut I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary.
>
> It is a fortunate thing that the objection to Government has been made on the ground I stated; because it will be practicable, on that ground, to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual and this without endangering any part of the Constitution, which is considered as essential to the existence of the Government by those who promoted its adoption.

He concluded that it would be "proper in itself, and highly politic, for the tranquillity of the public mind, and the stability of the Government, that we should offer something, in the form I have proposed, to be incorporated in the system of Government, as a declaration of the rights of the people" (*id.* at 439–440).

The provision under consideration was phrased in the Madison draft as follows (*id.* at 434):

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; * * *

In view of the stated purpose of the amendments, the intent of the "one punishment or one trial for the same offence" clause was obviously to cover either a conviction or an acquittal for the same offense. However, an ambiguity in the language was pointed out by Representative Benson in debate, on August 17, 1789 (*id.* at 753):

> Mr. BENSON thought the committee could not agree to the amendment in the manner it stood, because its meaning appeared rather doubtful. It says that no person shall be tried more than once for the same offence. This is contrary to the right heretofore established; he presumed it was intended to express what was secured by our former Constitution, that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment, for which reason he would move to amend it by striking out the words "one trial or."

These views were seconded by another member (*ibid.*):

> Mr. SHERMAN approved of the motion. He said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor. He thought that the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time, but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him. Now the clause as it stands would deprive him of that advantage.

But the attempted correction of a flaw in the original language would have created a second, more serious flaw. Striking out the words "one trial or," would leave nothing in the clause to prevent a second trial after an accused had been acquitted. This was pointed out by another member (*ibid.*):

> Mr. LIVERMORE thought the clause very essential; it was declaratory of the law as it now stood; striking out the words would seem as if they meant to change the law by implication, and expose a man to the danger of more than one trial. Many persons may be brought to trial for crimes they are guilty of, but for want of evidence may be acquitted; in such cases it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence; therefore the clause is proper as it stands.

> Mr. SEDGWICK thought, instead of securing the liberty of the subject, it would be abridging the privileges of those who were prosecuted.

The latter view carried the day and the motion was lost (*ibid.*). Further changes in the wording of the clause do not appear in the Annals.

While the Annals thus fail to give an explicit account of how the present language of the provision "twice put in jeopardy" was adopted, it appears to relate to the common law pleas of former acquittal and former conviction. The term "former jeopardy" was used in the English common law as an abbreviated description of those defenses.[8] Mr. Benson's particular interest in the clause, the fact that the final amendment used the word "jeopardy," which Mr. Benson had himself used in its common law sense during debate, and the further fact that the other members of the committee disagreed with him only as to the

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[8] The interchangeability of the terms is illustrated by *Vaux's Case*, 4 Co. Rep. 44a, 45a:

> (T)he life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offense is a good plea * * *.

And by Blackstone, 4 *Commentaries*, 335:

> (T)he plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime. * * *

choice of language, all lead to this conclusion, particularly since the universally agreed purpose of all the amendments was to restate existing rights and guaranty their preservation, rather than to create any new rights.

b. The early federal decisions make clear that the right to discharge a jury before verdict and retry the defendant was considered as something apart from the question of double jeopardy. In *United States* v. *Perez*, 9 Wheat. 579, decided in 1824, in holding that there could be a retrial in a capital case after the jury had failed to agree, this Court, through Mr. Justice Story, said (pp. 579–580):

> We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances; and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faith-

> ful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *

The *Perez* opinion seems clearly to have adopted what later became the English view that, while as a matter of practice the power to order a discharge ought to be sparingly exercised, even an erroneous discharge would not operate to bar a second trial, for so long as the defendant "has not been convicted or acquitted," he "may again be put upon his defence." The necessary implication was that the double jeopardy clause was limited to the common law pleas in bar—*autrefois acquit* or *convict*—and that there was no prior jeopardy within the meaning of the Constitution so long as the prior trial was aborted before verdict. That implication is confirmed by the opinion of Mr. Justice Washington, who participated in the *Perez* decision, just a few months earlier in *United States* v. *Haskell,* 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15,321), where, sitting on circuit, he had expressly held that the double jeopardy clause of the Fifth Amendment was limited to prior convictions or acquittals and was inapplicable to mistrials. He made this point (26 Fed. Cases at 212):

> We are in short of opinion, that the moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the constitution; and

> I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction. * * *

Story himself, in the first edition of his *Commentaries on the Constitution* (1833), published only nine years after his opinion in *Perez*, confirmed that view of the Fifth Amendment (Sec. 1787):

> * * * The meaning of it is, that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury * * *. But it does not mean that he shall be tried for the offence a second time if the jury shall have been discharged without giving a verdict; * * * for in such case his life or limb cannot judicially be said to have been put in jeopardy.[9]

2. In order to protect a defendant from unfair treatment by the prosecution, double jeopardy took on content in this country as a limitation on the court's power to discharge a jury and permit retrial

The discussion of the double jeopardy clause as a limitation upon the court's power to discharge a

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[9] Mr. Justice Story again expressed the same view the following year while sitting on circuit, saying of the decision in *Perez* that "the court did not go into any exposition of the clause of the Constitution * * * but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted and *therefore* might again be put upon his defence."

jury and permit retrial seems to have started with state decisions. Since the question of power to discharge juries at all, even in the case of disagreement, was in an unsettled state in England at the time the Bill of Rights was adopted, and since the text book writers, on whom American lawyers relied to a considerable extent, stated the rule against discharge more categorically than was probably the actual practice,[10] it is not surprising that the state decisions varied. The power to discharge the jury was denied in *State* v. *Garriguez*, 1 Haywood 241 (N. Car., 1795) and *Commonwealth* v. *Cook*, 6 Serg. & R. 577 (Pa., 1822). It was upheld in *People* v. *Olcott*, 2 Johns. Cases 301 (N.Y., 1801), *People* v. *Goodwin*, 18 Johns. 187 (N.Y., 1820), and *Commonwealth* v. *Bowden*, 9 Mass. 494 (1813). The difference in approach on this question of power has continued to this day so that, while all States now recognize the power to discharge a jury in case of disagreement, there is still a difference in state courts as to whether the power to grant a mistrial will be broadly or narrowly construed.[11]

United States v. *Gilbert*, 2 Sumner 19, 56, 25 Fed. Cases 1287 (No. 15,204) (D. Mass. 1834) (emphasis added).

[10] Blackstone's version of the rule (4 Blackstone, *Commentaries*, 360) was that, after evidence had been presented "the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict * * *." It should be noted that Blackstone's statement is given, not in relation to a plea of *autrefois acquit* or *convict* but in his discussion of procedure at the trial. Note also that the limitation was said to apply after evidence had been presented.

[11] The decisions are summarized by states in 2 Wharton, *Criminal Procedure* (10 ed.), Secs. 1427–1457.

Possibly because the question of power had historically been linked to an abuse of royal power, or perhaps because United States lawyers and judges tended to think in terms of constitutional limitations, the American decisions on the right to discharge a jury began early to take on constitutional overtones, with the double jeopardy clauses of the state constitutions being interpreted as going beyond the pleas of *autrefois acquit* or *convict* and including protection, at least in some circumstances, against a second trial even though the first had aborted before verdict. See, *e.g.*, *Commonwealth* v. *Cook*, 6 Serg. & R. 577 (Pa. 1822). The United States courts, unlike the British, have never been willing to trust the unreviewable discretion of a trial judge on granting a mistrial, however much his discretion is unreviewable on granting a judgment of acquittal. Justice Washington, who, as discussed above, expressed the view in *United States* v. *Haskell*, 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15,321), that the double jeopardy clause did not apply at all to cases of mistrial, indicated that on a motion in arrest of judgment it would be proper to consider whether a discharge of the first jury for the reason assigned by the trial judge was legally valid.[12] The implication of *Perez*, that the double jeopardy clause applies exclusively to cases of former acquittal or conviction, has not been followed to the logical extreme of the British cases. While this Court, in every case that has come before it, has upheld the retrial

[12] A contrary view was expressed in a long opinion reviewing the authorities in *United States* v. *Bigelow*, 14 D.C. 393 (1884).

after discharge for one of a variety of reasons,[13] the very fact that the Court considered the reasons for the discharges conveys some implication that a second trial might be barred as double jeopardy, depending upon the reasons for the discharge. The most recent decisions of the Court have made explicit that in some circumstances the double jeopardy clause would be held to apply to mistrials. See *Wade* v. *Hunter,* 336 U.S. 684, 688; *Gori* v. *United States,* 367 U.S. 364.

The "type of oppressive practices at which the double-jeopardy prohibition is aimed" (*Wade* v. *Hunter, supra,* 688–689), and by which its content in the context of retrial after discharge of a jury is to be defined, was spelled out in a somewhat different context, in *Green* v. *United States,* 355 U.S. 184, 187–188:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to

[13] *Simmons* v. *United States,* 142 U.S. 148 (publication of controverted reports of a juror's acquaintance with defendant); *Logan* v. *United States,* 144 U.S. 263, 297–298 (failure to agree); *Thompson* v. *United States,* 155 U.S. 271 (discovery of disqualification of juror who had served on grand jury); *Lovato* v. *New Mexico,* 242 U.S. 199 (technical discharge and reswearing of jury in erroneous belief that defendant had not yet pleaded); *Wade* v. *Hunter,* 336 U.S. 684 (court-martial dismissed when military advance of unit made it impracticable to obtain additional witnesses desired to be heard by court-martial); *Gori* v. *United States,* 367 U.S. 364, 369 (mistrial granted on court's own motion for what court believed to be misconduct of the prosecutor).

> make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Referring specifically to the applicability of the double-jeopardy clause when a trial is terminated before verdict, the Court gave as the reason for that application that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict" (355 U.S. at 188).

However, in all the cases that have come before it, this Court has made it clear that, where there has been no adjudication on the merits, the question of the right to retry a defendant after a jury has been discharged is a matter which cannot be encompassed in rigid technical concepts. From its earliest decision in *United States* v. *Perez*, 9 Wheat. 579, to its latest decision in *Gori* v. *United States*, 367 U.S. 364, this Court has emphasized that the matter is one which must in large part lie in the discretion of the trial judge. In terms of the standards by which the trial courts are to be governed in declaring mistrials, the Court "has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served." *Brock* v. *North Carolina*, 344 U.S. 424, 427. And in determining whether a retrial is barred once a jury has been discharged, the Court has looked

to all the circumstances of the particular case to determine whether the retrial violated the underlying "intent" of the Fifth Amendment. In *Wade* v. *Hunter*, 336 U.S. at 688–689, the Court, in an opinion by Mr. Justice Black, noted that the Fifth Amendment:

> * * * does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

The Court expressly rejected a standard requiring an "imperious" or "urgent necessity" for a mistrial or even a rule that the absence of witnesses can never justify a discontinuance, saying (*id.* at 691): [11]

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[11] Cf. the decision of Mr. Justice Story, on circuit, in *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cases 622 (No. 14,858), granting a government motion for a mistrial when an essential witness unexpectedly refused to be sworn. Reflecting the concerns later expressed by the Court in *Wade* v. *Hunter*, *supra*, Mr. Justice Story stated (25 Fed. Cases at 623): "* * * Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared, that on [the witness'] testimony depended a conviction or an acquittal: would it be reasonable that the cause should proceed? [The witness] may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion, that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see, whether the witness will not consent to an examination."

> * * * Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

Both the "public interest" and the rights of a defendant must be considered in determining whether re-trial after discharge of a jury violates the double jeopardy clause. The standard of the "ends of public justice," to which petitioner excepts (Br. 5), has been the touchstone in this country throughout its history. It requires that all the circumstances of the case be considered, including the interest of the accused that he not be put to the expense, the mental strain and the harrassment of protracted litigation. It includes his right to be protected against dismissal in order to help the prosecution, "at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori* v. *United States*, 367 U.S. at 369. It also takes into consideration the interests of the public, represented by the government, in having a full trial on the merits of the charges brought by the grand jury. It further takes into consideration the practical considerations that govern a trial court in handling a docket of cases which affect the affairs of the public generally. It is in the light of all these that this case must be judged.

II

ON THE PARTICULAR FACTS OF THIS CASE, RETRIAL OF THE DEFENDANT WAS NOT UNFAIR AND THEREFORE DID NOT CONSTITUTE DOUBLE JEOPARDY

A. PETITIONER WAS IN JEOPARDY IN ONLY THE MOST TECHNICAL SENSE OF THE TERM AND WAS NOT PREJUDICED BY THE DISCHARGE OF THE JURY

Before discussing the application of the foregoing principles to the facts of this case, it may be well to point out that the question of when jeopardy attaches has significance only in framing the issue presented. Obviously, if it could be said that jeopardy had not attached at all—that what occurred was merely a nonsuit or a continuance—there would be no problem of "double jeopardy" and the clear absence of any prejudice to the petitioner would undoubtedly warrant an affirmance of the decision below. However, the fact that jeopardy may have attached does not, in our view, require a contrary result, but only defines the question as one involving the Constitution. The answer, as the history of the double jeopardy clause shows, depends upon the essential fairness to the public and the petitioner of the discharge and order for retrial.

We do not dispute petitioner's position that under the federal decisions, "jeopardy" attaches at the time the jury is sworn so that the constitutional issue is presented here. This seems to be the implication of *Lovato* v. *New Mexico*, 242 U.S. 199, where the judge discharged the jury after it had been impaneled in order to permit the re-arraignment of the defendant after overruling a demurrer, and had the same

jury resworn. The fact that the Court discussed the right of the trial court to do this indicates that the question of jeopardy does arise once the jury has been sworn.

Nevertheless, in determining whether what occurred here involved basic unfairness to the petitioner, it is well to note that this case had not progressed to the point where the trial could be said, in any realistic sense, to have begun. The jury, although chosen, had not even assembled in the box. Under the old practice, where jeopardy was said not to attach until a jury was "charged" with the case, *i.e.*, until the indictment had been read to them, there would have been no jeopardy at all. See Wharton, *Criminal Procedure* (10 ed.) Sec. 1454; *McFadden* v. *Commonwealth*, 23 Pa. 12. The prior "jeopardy" in this case was jeopardy only in the most technical sense of the term, without in any realistic sense subjecting the defendant to the hardships of a trial. Accordingly, there is absolutely no basis for petitioner's claim of prejudice—unless it refers to the necessity of undergoing a trial on the merits.

In the language of *Bigelow* v. *United States*, 14 D.C. 393, 397 (1884):

> The processes of impaneling and swearing them have only the effect to organize and qualify the tribunal by which the prisoner is to be tried, and the charge had only the effect to inform them of the nature of the duty they were to perform in that trial. In either case they are only ready for the performance of their functions; but they have not thereby begun their actual performance.

To say that a two-day continuance and a trial before the jury chosen on April 25 would have been proper, but that the discharge of a jury which had not assembled to hear the case followed by retrial two days later must give the defendant the benefit of a judgment of acquittal, exalts form over substance. Since the only difference in the right of the defendant would be in the composition of the jury chosen to try the case, such a ruling would in effect return to 16th century notions of the mystical nature of a jury sworn to try a case.

B. THIS CASE INVOLVED A MERE OVERSIGHT AND NOT A FAILURE OF EVIDENCE ON THE PART OF THE PROSECUTION

The prosecution is not entitled to a mistrial because its case is going badly. A retrial in those circumstances would represent such oppression as would justify a plea of double jeopardy. For this reason, the action of the prosecutor in entering a *nolle prosequi* after the trial had begun, was properly held to have the effect of an acquittal and to bar reindictment. *United States* v. *Shoemaker,* 2 McLean 114, 27 Fed. Cases 1067 (No. 16,279). Unquestionably the courts tend to view with strictness attempts by the prosecution to obtain a discharge of the jury because of the absence of witnesses. *United States* v. *Watson,* 3 Ben. 1, 28 Fed. Cases 499 (No. 16,651); *Cornero* v. *United States,* 48 F. 2d 69 (C.A. 9). The *Cornero* case on its particular facts reached a correct result. In that case there was a continuance of five days because the government witnesses could not be found, followed by a mistrial and a second trial two years later. In that

situation, not only was retrial after two years a harassment of the defendant, but in a realistic sense it could be said that the government proceeded to trial without its evidence. In this case, on the other hand, the government was not proceeding to trial without knowing that it had the witnesses to prove its case. It knew that the witnesses were available; the only failure was to check on whether the available witness had in fact been served with the subpoena which had been issued.[15]

The trial court properly found that the failure of the prosecution to know of the absence of a key witness was an excusable oversight. The situation, in brief, was that on Wednesday or Thursday of the preceding week the court had asked that some twelve cases be set down for the following Monday. Sub-

[15] The circumstances of *Watson* similarly distinguish that case from this. There the district court granted an eight-day continuance when, following the swearing of the jury, the government advised that the district attorney was ill and that its witnesses were absent. When the trial was resumed twelve days after the continuance was granted, the assistant district attorney moved that the trial "go off for the term" because of the illness of the district attorney and the absence of witnesses for the prosecution. The court thereupon directed the withdrawal of a juror. In holding that the circumstances did not warrant the discharge of the jury and that the defendant's retrial was barred, the court noted that it did not appear that the illness of the district attorney occurred after the jury was sworn, that it was impossible for the assistant district attorney to conduct the trial or that the absence of the witnesses was first made known to the law officers of the government after the jury was sworn. There is no indication that subpoenas for the witnesses had been issued or of any circumstances justifying the absence of the witnesses (28 Fed. Cases at 499–501).

poenas were issued for all the approximately 100 witnesses and placed in the hands of the marshal for service. This case was number ten on the list, but was reached on Tuesday. The prosecutor's office was short-handed, the trial attorney had been trying another case that morning, he had the previous day accepted verbal assurances that this particular witness would be located. He announced ready without checking on this and the jury was selected before he discovered his mistake. That this explanation was not a mere cover for negligent preparation was verified by the trial judge, who personally knew the situation. That one witness of the approximately one hundred for whom subpoenas had been issued was not served and that the failure had escaped the trial attorney's attention was understandable. It was certainly not an error of the cataclysmic proportions attributed to it. Even if the oversight be deemed inexcusable, it certainly was not deliberate. There is no basis in the record for the suggestion that the occasion was used as a means of getting a "free look" at the jury and no basis for the contention that an affirmance will give other prosecutors in other cases the opportunity for a free look. When and if such a situation should arise, the courts have ample powers to deal with it so as to protect the rights of defendants. In this case there was an oversight which, whether excusable or not, merely resulted in a two-day postponement. Petitioner's attempt to formulate a rigid rule on the basis of *Cornero* has already been

rejected by this Court in *Wade* v. *Hunter*, 336 U.S. 684, 691, where it said:

> We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

See also *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cases 622 (No. 14,858).

Here there was no harassment. There was a mistake by the prosecution in stating that it was ready—a mistake which was discovered before the defendant, in any realistic sense, had been put to the burden of trial. An inadvertent error by a human prosecutor ought not to deny the public its day in court and allow a defendant to go free without a trial.

C. THE FACT THAT THE JUDGE MIGHT HAVE CHOSEN ALTERNATIVE METHODS OF DEALING WITH THE SITUATION DOES NOT WARRANT GIVING PETITIONER THE BENEFIT OF A JUDGMENT OF ACQUITTAL WHEN DISCHARGE OF THE JURY DID NOT AFFECT HIS RIGHTS

From the vantage point of hindsight, without the pressures of conducting twelve cases in one week, it may be evident that both the Assistant United States Attorney and the trial judge might have handled the

matter somewhat differently. The prosecutor might have asked for and the judge, having found excusable oversight, might have granted a two-day continuance. This would have tied up the jury which had already been selected, and the judge, at that moment concerned with his calendar, obviously considered this an undesirable solution. As we have already pointed out, the insubstantial nature of any claim of prejudice in this case is emphasized by the fact that it seems to be conceded that a two-day continuance would have been proper. And the formalistic, unrealistic nature of the claim presented in this case becomes even clearer when it is noted that, if the judge had granted a continuance over the objection of the defendant and, after conviction, on appeal such a continuance had been held improper, petitioner could have been retried after suffering not only the tensions of a full trial but also the disclosure of his entire defense. Yet he asks this Court to rule that the decision to discharge a jury which had never begun to hear the case prevents there ever being a trial of the merits.

Petitioner made the suggestion that the trial proceed on the four counts as to which the government witnesses had been subpoenaed, saying that he would just as soon have two trials. Petitioner did not then call to the attention of the judge the fact that a second trial on the two counts might be barred, and the judge quite correctly, both from the point of view of the calendar and the rights of the defendant, refused to have a properly joined case against one defendant split into two trials. Conceivably, the Assistant

United States Attorney could have gone ahead at that point on the four counts, on the theory that four counts would support any sentence the judge was likely to give. But the prosecutor, before trial, may well have felt that the witness who was not there was the strongest witness he had, and he cannot be blamed for not wishing to go to trial with the evidence which he knew would be readily available in the next day or two. Even on a trial of the first four counts, the testimony of the witness would have been relevant and admissible as showing petitioner's intent and purpose. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618; *United States* v. *Bucciferro,* 274 F. 2d 540 (C.A. 7); *Brehm* v. *United States,* 196 F. 2d 769 (C.A.D.C.), certiorari denied, 344 U.S. 838.

As we see the question in this case, it is not whether the prosecutor, or even the judge, made a mistake in discharging the jury. The question is whether the mistake was the kind of mistake which so deprived the petitioner of his rights that he is entitled to the effect of a verdict of acquittal without any trial on the merits. Human beings—judges, prosecutors and defense counsel—do make mistakes. Where such mistakes result in the infringement of a basic right of a defendant, where such mistakes result in the subjection of a defendant to the tension of real successive trials, the mistakes may result in a guilty defendant going free. But not every mistake rises to this category. Errors by a judge which result in the granting of a mistrial have been held not to bar a second trial. *Scott* v. *United States,* 202 F. 2d 354

(C.A.D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles,* 19 F. Supp. 1009 (W.D. Okla.). Errors by a prosecutor, which do not affect a defendant's rights, should not be held to a more rigorous standard.

The Court ever since *United States* v. *Perez,* 9 Wheat. 579, has recognized that the "ends of public justice" must be considered in determining whether there shall be a retrial after declaration of a mistrial. The constitutional provision for trial by jury does not concern the defendant alone. Article 3, Section 2, clause 3, states in terms that the trial "shall be" by jury, thereby creating a right in the people generally and in their government to have criminal prosecutions tried. The government's consent is therefore required to waive a jury trial. See *Patton* v. *United States,* 281 U.S. 276, 312; Rule 23(a), F.R. Crim. P. Similarly, this Court in *Ex parte United States,* 287 U.S. 241, 249, upheld the "absolute right" of the government, as the representative of the public, "to put the accused on trial"; and in *United States* v. *Thompson,* 251 U.S. 407, 415, the court overruled an "assertion of the judicial discretion * * * incompatible with * * * the right of the Government to initiate prosecutions for crime * * *." Thus, while the defendant is entitled to be protected against harassment and unfair tactics, the government too, and the public whom it represents in enforcing the criminal laws, are entitled to a fair opportunity to present their case and obtain an adjudication on the merits. Where a jury which has not begun to hear the case is discharged because of an inadvertent oversight by the

prosecution and trial is had two days later, a defendant has no more been harassed than he would have been if a continuance had been granted. Under such circumstances, the discharge of the jury should not be deemed the equivalent of a judgment of acquittal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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